A New Role for the Guardian Ad Litem

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The developing trend[1] of awarding divorcing parents joint custody of their children is a phenomenon which cannot be ignored. Changes in the laws and philosophy of child custody determination upon divorce are requiring courts, attorneys, and families to yield, albeit reluctantly, to the joint custody alternative.[2] Some suggestion has been made that joint child custody will eventually supercede the predominant sole custody/visitation formula as the standard post-divorce custody program.[3] Though rarely recommended for every family,[4] joint custody has been heralded as the ideal vehicle to promote the best interests of the children of divorce by way of serving the needs of the entire divorce-disrupted family. Requiring the maintenance, in varying degrees, of the legal and familial associations which existed before the divorce, joint custody reflects an emerging view of divorce as merely a temporary crisis in the life cycle of the family rather than an apocalyptic event.[5] After divorce, the family remains a "family"—with pre-divorce parental equality with respect to the children—a true family, from the children's perspective, though in restructured form.

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1. Gardner, *Joint Custody is Not for Everyone*, 5 FAM. ADV. 7 (1982), *reprinted in* JOINT CUSTODY AND SHARED PARENTING 69 (J. Folberg ed. 1984).

2. Although sometimes used synonymously with "joint custody," the terms "divided custody," "split custody," and "co-parenting," all refer to other variations of custody arrangements. They and other terms are defined and distinguished in Miller, *Joint Custody*, 13 FAM. L.Q. 345, 359-61 (1979) and in Folberg & Graham, *Joint Custody of Children Following Divorce*, 12 U.C.D. L. REV. 523, 526-28. (1979).

3. Scott, *Joint Custody: Does It Work?*, MS., Apr. 1983, at 77 (quoting Dr. John Haynes, President of the Academy of Family Mediators.) *One Child, Two Homes*, TIME, Jan. 29, 1979, at 61, (quoting Susan Whicher of A.B.A. Special Commitee on Joint Custody).

4. *See, e.g.*, M. ROMAN & W. HADDAD, THE DISPOSABLE PARENT: THE CASE FOR JOINT CUSTODY 104 (1978). This book provided most of the fuel for the joint custody revolution. The authors do list a series of "compelling reasons," the basis of which they believe a court would be justified in denying joint custody, *id.* at 174. For a critical analysis of its authority, *see, e.g.*, Felner, Farber & Kent, *Toward the Development of a Social Policy for Child Custody: A Multidisciplinary Framework*, 53 CONN. B.J. 301, 305-06 (1979).

5. Folberg & Graham, *supra* note 2, at 552. *See* R. WOODY, GETTING CUSTODY: WINNING THE LAST BATTLE OF THE MARITAL WAR 45, 46 (1978).

Joint custody, however, has not met with unanimous approval. Most critics and advocates choose their sides as the inevitable and pivotal question is raised: Can divorced parents leave the failed marriage and the divorce behind to communicate and cooperate for the benefit of their children?[6] The legal and social science literature sets forth lengthy discussion and strong opinion; unfortunately, it is short on supporting evidence.[7] This Article does not intend to rehash the increasingly redundant arguments for or against joint custody. Regardless of which side of the issue the reader may stand, joint custody has rapidly gained a foothold in our system of child custody determination upon divorce. Moreover, there are as many answers to the above question as there are sets of parents who emerge from the courts with spousal relationships severed but with predivorce parental legal relationships intact by the label of joint custody. Finally, the fact remains that not only is there no faithful compass for parents, attorneys, or courts to gauge which spouses will be able to communicate, cooperate, and compromise after divorce as parents, and which will not, but also there is no one who can really predict which custody arrangement will be in the best interests of particular children.

When joint custody has been agreed upon or ordered as the sub-

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6. This is not to suggest that this is the only question raised with respect to joint custody. After all, the fundamental issue always remains whether joint custody is in the best interests of the children. For representative criticism of the concept in general and proposed alternatives, *see generally* Schulman & Pitt, *Second Thoughts on Joint Child Custody: An Analysis of Legislation and Its Implications for Women and Children*, 12 GOLDEN GATE U.L. REV. 538 (1982); Levy & Chambers, *The Folly of Joint* Custody, 69 ILL. B.J. 412 (1981); Schulman, *The Truth About Joint Custody: Some Current Myths Exposed*, 3(1) WOMEN'S ADVOCATE. Probably the most influential resource, J. GOLDSTEIN, A. FREUD & A. SOLNIT, BEYOND THE BEST INTERESTS OF THE CHILD (1979).

For general criticism of BEYOND THE BEST INTERESTS OF THE CHILD as a "good example of misapplication," *see, e.g.*, Folberg & Graham, *supra* note 2, at 557-59; Foster & Freed, *Joint Custody, A Viable Alternative*? 28 TRIAL 26 (May 1979) [hereinafter *A Viable Alternative*]; Steinman, *Joint Custody: What We Know, What We Have Yet To Learn, and the Judicial and Legislative Implications*, 16 U.C.D. L. REV. 739, 740 (1983); Felner, Farber & Kent, *supra* note 4, at 303; Parley, *Joint Custody: A Lawyers Perspective*, 53 CONN. B.J. 310, 311-12 (1979); Johnston, *Shared Custody After Parental Separation*, 1982 N.Z. L.J. 8, 9; Clawar, *Popular and Professional Misconceptions About Joint Custody*, CONCIL. CTS. REV., Dec. 1983, at 27, 29, 32; M. ROMAN & W. HADDAD, *supra* note 4, at 106-13.

7. There are numerous studies, but each contains sample groups too small or deliberate to be able to derive decisive data on the system. *See, e.g.*, Clawar, *supra* note 6, at 27; Steinman, *The Experience of Children in a Joint Custody Arrangement: A Report of a Study*, 51(3) AM. J. ORTHOPSYCHIATRY 403 (July 1981); Steinman, Zemmelman & Knoblauch, *A Study of Parents Who Sought Joint Custody Following Divorce: Who Reaches Agreement and Sustains Joint Custody and Who Returns to Court*, 24 J. AM. ACAD. CHILD PSYCHIATRY 554 (1985); D. LUEPNITZ, CHILD CUSTODY: A STUDY OF FAMILIES AFTER DIVORCE (1982); Greif, *Fathers, Children and Joint Custody*, 49 AM. J. ORTHOPSYCHIATRY 311 (1979).

structure for the post-divorce family,[8] in many circumstances the appointment of a guardian ad litem for the children to serve as a family mediator may be the best method available[9] to protect the interests of the children, to promote the objectives of joint custody, and to provide courts with a mechanism to measure the success or failure of joint custody. Such a mechanism may resolve many of the problems which trouble both supporters and opponents of joint custody and may thereby offer reluctant parents and courts, when circumstances demand an award of joint custody, the opportunity to experiment with relative safety for the children.[10]

I. THE PROBLEM OF JOINT CUSTODY: COOPERATION OR CONFLICT

The concept of joint custody represents the collaboration of two fundamental precepts of modern custody law:[11] (1) the children's best interests are paramount in the custody determination,[12] and (2) both parents are presumed to be "fit" custodians of their children.[13] In the

8. Although the vast majority of the authorities employed for support of the proposition herein discuss the application of joint custody, mediation, and guardians ad litem in a pre-decree context, the central concern of my discussion is how these are applied *after* the issuance of the final decree embodying a settlement between the parties or an order for joint custody.

Thus, I will not discuss the methods for attorneys to determine whether joint custody should be recommended to clients. The use of mediation to effect reconciliation of divorcing parents or to determine the form of custody optimal for the family also will not be explored. Nor will the merits of the use of guardians ad litem in the divorce custody proceedings or others be evaluated. Most of the authorities cited within this paper can provide such information or direct the interested reader toward the proper sources.

9. The merits of court-connected alternative dispute resolution in the post-decree setting where certain institutions have already been established to deal with custody problems, e.g., court-connected conciliation programs, especially where the initial joint custody agreement was hammered out in such a program, will not be addressed at length in this article. The greater need in the community at present appears to be to devise a system to handle post-decree problems where the legislatures or courts have been unable or unwilling to institute official programs. Note, however, that the proposal made in this article may have some distinct advantages to such programs. *See infra* notes 207-09 and accompanying text.

10. This Article does not advocate the use of the child as a guinea pig for legal theorists. "[T]he child is not something with which to experiment in determining custody arrangements after divorce." Speca & Wehrman, *Protecting the Rights of Children in Divorce Cases in Missouri*, 38 U.M.K.C. L. REV. 1, 8 (1969). However, under some circumstances judges may feel compelled by law or circumstance to award joint custody despite suspicion as to its success.

11. Salfi & Cassady, *Who Owns the Child? Shared Parenting Before and After Divorce*, 20(1) CONCIL. CTS. REV., Jan. 1982, at 31; Robinson, *Joint Custody: An Idea Whose Time Has Come*, 21 J. FAM. L. 641 (1983).

12. Scott & Derdeyn, *Rethinking Joint Custody*, 45 OHIO ST. L.J. 455, 457 (1984).

13. The presumption of equality of parental fitness for custody purposes is embodied in the law of most jurisdictions. *See, e.g.*, OHIO REV. CODE ANN. § 3109.03. (Baldwin 1983).

custody decision making process, primary consideration is to be paid to the best interests of the children.[14] Yet, in the adversarial machinery of the courts,[15] where sole custody is imposed on a two parent family based "on the issue of parental conflict rather than on the child's relationship to the individual parents," the result of this inquiry cannot be less centered on the child.[16] Children's needs for guidance, care, and access to each parent rarely cease with the commencement of a divorce action by their parents,[17] nor with a determination of their parents' relative fitness by a stranger to the family.[18] Joint custody provides children and parents with a custody system which best parallels the relationship prior to the divorce and, thereby, arguably provides "the least disruptive custody arrangement" for the children after the divorce.[19]

The joint custody system recognizes not only that children need both parents after divorce, but also that both parents continue to need strong association with their children. The psychological health and functioning

14. In every custody decision, in each of the fifty states, courts use this or a similar formula to guide the reconstuction of the family upon divorce. *See, e.g.*, OHIO REV. CODE ANN. § 3109.04 (Baldwin Supp. 1987). Criticism of the standard has been harsh from all sides of the child custody law dialectic. *See, e.g.*, Scott & Derdeyn, *supra* note 12, at 467; Note, *Lawyering for the Child: Principles of Representation in Custody and Visitation Disputes Arising From Divorce*, 87 YALE L.J. 1126, 1135 (1978); Meyer & Schlissel, *Difficult Areas for Judges - Child Custody in Divorces*, N.Y. L.J., Sept. 15, 1982, at 1, col. 1; Levy & Chambers, *supra* note 6, at 417; Chambers, *Rethinking the Substantive Rules for Custody Disputes in Divorce*, 83 MICH. L. REV. 477, 480-85 (1984).

15. The adversarial nature of custody decision-making in the courts provides parents with the ideal stage for the expression of spousal self-interest and encourages competitive strategies. The essential question of the children's best interests after the divorce is subsumed by parental interest in obtaining custody of the children as the symbolic prize of their interspousal war. *See, e.g.*, Green, *Joint Custody and the Emerging Two-Parent Family*, CONCIL. CTS. REV., June 1983, at 65, 69, 70; Salfi & Cassady, *supra* note 11, at 314, Robinson, *supra* note 11, at 645; I. RICCI, MOM'S HOUSE/DAD'S HOUSE 51-52 (1980); Gaddis, *Joint Custody of Children: A Divorce Decision-Making Alternative*, 16(1) CONCIL. CTS. REV., June 1987, at 17, 19; Folberg & Graham, *supra* note 2, at 549.

16. Green, *supra* note 15, at 69.

17. Foster & Freed, *Joint Custody, Legislative Reform*, TRIAL, June 1980, at 22, 24; Salfi & Cassady, *supra* note 11, at 33.

18. Grief, *Joint Custody: A Sociological Study*, TRIAL, May 1979, at 32, 33.

19. Folberg & Graham, *supra* note 2, at 536. Note that is not the fact of divorce which activates dysfunctions in children, but the disruptions associated with it. Scheiner, Musetto & Cordier, *Custody and Visitation Counseling, A Report of an Innovative Program*, 31 FAM. REL. 99, 100 (1982).

For discussion of the manner in which joint custody or shared parenting provides the children of divorce "continuity and stability," *see* Clawar, *supra* note 6, at 31, 32, 36, 37; Salfi & Cassady, *supra* note 11, at 37; Clingenpeel & Repucci, *Joint Custody After Divorce: Major Issues and Goals for Research*, PSYCHOLOGICAL BULL., Jan. 1982, at 102, 107; Kelly, *Examining Resistance to Joint Custody*, in JOINT CUSTODY AND SHARED PARENTING 39, 43, 44, 46 (J. Folberg ed. 1984); Miller, *supra* note 2, at 366; Johnston, *supra* note 6, at 16, 21; Note, *Joint Custody: The Best Interests of the Child*, 18 TULSA L.J. 159, 166 (1982).

of the children are "interdependent with and to a large measure a by-product" of that of their parents.[20] The problems for parents created by the sole custody scheme and the effect of those problems on the children are legion.[21] With joint custody, parental rights and responsibilities toward the children, proximate to those that existed before the divorce, continue as if the nuclear family had survived. The court is not compelled to make an ominous and irrational choice[22] between two relatively fit pre-divorce custodians. Instead, divorce proceedings merely terminate the marriage, not the family.[23] Formal recognition of the joint custody alternative is a tacit concession by the courts and legislatures of their comparative ignorance and impotence in making the far-reaching child rearing decisions better left to the parents.[24] Recognition of this alternative also defers to the constitutional concept of family autonomy.[25]

Divorced parents' capacity to *cooperate* and *communicate* within the inherently elastic[26] framework of joint custody is unquestionably the key

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20. Folberg & Graham, *supra* note 2, at 553. *See also*, Controneo, *At the Intersection of Family Systems and Legal Systems: Child Custody Decisions in Context*, 53 CONN. B.J. 349, 354 (1979); Comment, *Joint Custody, An Alternative for Divorced Parents*, 26 U.C.L.A. L. REV. 1084, 1113 (1979).

21. *See generally* J. WALLERSTEIN & J. KELLY, SURVIVING THE BREAKUP: HOW CHILDREN AND PARENTS COPE WITH DIVORCE (1980) (both authors have been associated with mediation practice).

For a discussion of the effect of the noncustodial role on fathers, *see* Hetherington, Cox & Cox, *Divorced Fathers*, 25 FAM. COORDINATOR 417, 421, 427 (1976); Controneo, *supra* note 20, at 352; Grief, *supra* note 18, at 32; Trombetta, *Joint Custody: Recent Research and Overloaded Courtrooms Inspire New Solutions to Custody Disputes*, 19 J. FAM. L. 213, 222 (1980); D'Andrea, *Joint Custody as Related to Parental Involvement and Parental Self-Esteem*, 21(2) CONCIL. CTS. REV. 81 (Dec. 1983); Robinson, *supra* note 11, at 644; Clawar, *supra* note 6, at 27, 36; Comment, *supra* note 20, at 1114; Folberg & Graham, *supra* note 2, at 563, 564; Foster & Freed, *supra* note 17, at 23; J. WALLERSTEIN & J. KELLY, *supra* note 21, at 237, 242.

For a discussion of the effect of the exclusive custodial role on mothers, *see* Miller, *supra* note 2, at 356; Folberg & Graham, *supra* note 2, at 553, 583; Trombetta, *supra* note 21, at 222; J. ROMAN & W. HADDAD, *supra* note 4, at 76-79; J. WALLERSTEIN & J. KELLY, *supra* note 21, at 102, 109, 110, 117, 120; Clingenpeel & Repucci, *supra* note 19, at 111.

As for the often harmful effect of divorce on children, nearly every resource cited in this article examines in varying degree the subject.

22. Kelly, *supra* note 19, at 46.

23. Robinson, *supra* note 11, at 644.

24. Spencer & Zammit, *Mediation Arbitration: A Proposal for Private Resolution of Disputes Between Divorced or Separated Parents*, 1976 DUKE L.J. 911, 918; Folberg & Graham, *supra* note 2, at 560-61.

25. *See* Folberg & Graham, *supra* note 2, at 536. For a detailed argument, *see generally* Canacakos, *Joint Custody as a Fundamental Right*, 23 ARIZ. L. REV. 785 (1981), *reprinted in* JOINT CUSTODY AND SHARED PARENTING 223 (J. Folberg ed. 1984).

26. This flexibility permits regular and easy adjustment of the child-care arrangement to the changing needs of parents and children without resort to the courts. *See* Gaddis, *supra* note 15, at 18; Miller, *supra* note 2, at 361, 363; Folberg & Graham, *supra* note 2, at 560-61.

to the practical viability of the concept.[27] Whether joint custody is "joint legal custody"[28] or "joint physical custody,"[29] shared decision-making authority and responsibility, that is, mandatory "parental consultation and agreement on all major decisions affecting the children," is the absolute minimum requirement of the model.[30] The authorities concur that the most positive outcomes for children of divorce are promised when both parents are committed and actively involved in their children's lives and when parental hostility is supplanted by cooperation for the sake of the children.[31] However, when hostile tension characterizes the

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27. Gardner, *supra* note 1, at 66; *A Viable Alternative*, *supra* note 6, at 27, 31; Miller, *supra* note 2, at 369.

Parents need not have an amicable relationship, but need only to isolate and shelter from children their interpersonal conflict. *See* Folberg & Graham, *supra* note 2, at 550. Emphasis must be made that the above authors do not exclusively rest their recommendations on this factor, but in many cases regard other factors as of equal or relative importance. The necessity of the element of cooperation and communication, however, dominates the literature.

28. The greater part, perhaps 95 percent of the joint custody awards only provide for this shared decision-making power. *See* Schulman & Pitt, *supra* note 6, at 543, often leaving the parties in a custody structure similar to sole custody with liberal visitation. Zimmerman, *The Problems of Shared Custody*, 4 COL. LAW 24, 26 (1984). Phear, Beck, Hauser, Clark & Whitney, *An Empirical Study of Custody Agreements: Joint Verses Sole Legal Custody* in JOINT CUSTODY AND SHARED PARENTING 142 (J. Folberg ed. 1984). For criticism of this form of joint custody award, *see Why Joint Custody Doesn't Always Work*, CHANGING TIMES, July 1984, at 58, 60; Schulman & Pitt, *supra* note 6, at 570; Schulman, *supra* note 6, at 3.

29. At most, perhaps five percent of the awards are for joint physical custody, where parents share the day to day care and responsibility for the children. Most joint custody commentators regard the inclusion of both legal and physical custody responsibilities in the post-divorce arrangement as essential. *See, e.g.*, *A Viable Alternative*, *supra* note 6, at 28; Steinman, *supra* note 6, at 740; Clawar, *supra* note 6, at 27; Skoloff, *Joint Custody: A Jaundiced View*, TRIAL, Mar. 1984, at 52.

30. Miller, *supra* note 2, at 360, 367-68.

31. J. WALLERSTEIN & J. KELLY, *supra* note 21, at 126, 154, 215, 218. *See also* M. ROMAN & W. HADDAD, *supra* note 4, at 71; Controneo, *supra* note 20, at 352.

Even the staunchest opponents of joint custody concede that the *concept* is viable and salutary for the post-divorce family when both parents agree to it and cooperate in its execution. *See* Schulman & Pitt, *supra* note 6, at 570 ("[S]uch cases are in the minority."). In BEYOND THE BEST INTERESTS OF THE CHILD, *supra* note 6, the authors direct their recommendations for exclusive custody to a psychological parent (with no visitation rights to the noncustodian) in only "contested custody placements." J. GOLDSTEIN, A. FREUD, & A. SOLNIT, *supra* note 6, at 8. They do not object to frequent visitation even in this context. *Id.* at 118-20. The argument is that parents who can cooperate after divorce and who intend to remain active in their children's lives will naturally effect co-parenting arrangements, and legal recognition of their arrangements is unnecessary. Where judicial intercession or approbation is required, one or both parents probably lack the necessary cooperative attitudes to share responsiblity for their children, and the imposition of the arrangement only promises future conflict within a structure which encourages frequent parental contact. Levy & Chambers, *supra* note 6, at 418. *See generally* J. GOLDSTEIN, A. FREUD & A. SOLNIT, *supra* note 6, at 118-20.

Joint custody is not to be confused with what has been variously termed "co-parenting," "shared parenting," or "joint parenting," the essence of which is also parental cooperation. With co-parenting the sole custody/visitation model is the *legal* framework for post-divorce

post-divorce relationship, dire consequences for the social and psychological development of children may be expected.[32] If the slightest divisiveness exists between parents at the time of their divorce, the compelled interaction of the joint custody formula may exacerbate parental tensions and destroy all potential for cooperative decision-making in the future.[33] Parents must "allocate ... power and respectability" to one another,[34] by supporting their children's positive relationships with each parent. Otherwise, the fears of the skeptics of joint custody will be realized and the children will certainly become the victims, rather than the beneficiaries, of joint custody.

Joint custody may have definite advantages for children and parents after divorce, but parental conflict remains the primary issue to be confronted.[35] Unfortunately, this issue is not likely to become prominent until the final judgment entry is filed by the court and the parties return to their respective homes to struggle with the mechanics of their individual joint custody programs. The issue may have been lost during the custody proceedings because of statutory presumptions or preferences for joint custody[36] coercing parents and courts to aquiesce to the scheme[37]

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familial interaction, but shared care and control of the children—not custody—by both parents is the nature of parental practice. A moral commitment to the children and an emotional armistice between parents allows determined parents to voluntarily implement this cooperative venture and eliminates the need for court intrusion in the family. *See* Levy & Chambers, *supra* note 6, at 418; M. MORGENBESSER & N. NEHLS, JOINT CUSTODY: AN ALTERNATIVE FOR DIVORCING FAMILIES 31 (1981); Salfi & Cassady, *supra* note 11, at 35.

32. *See* J. WALLERSTEIN & J. KELLY, *supra* note 21, at 158, 224; Controneo, *supra* note 20, at 352; D. SAPOSNEK, MEDIATING CHILD CUSTODY DISPUTES 12 (1983); Felner, Farber & Kent, *supra* note 4, at 304; Clingenpeel & Repucci, *supra* note 19, at 110; Steinman, *supra* note 7, at 409. *But cf.*, Robinson, *supra* note 11, at 652; Meyer & Schlissel, *Difficult Areas for Judges - Child Custody in Divorce*, N.Y. L.J., Sept. 17, 1982, at 1, col. 1, (citing Wallerstein, *The Child in the Divorcing Family*, JUDGES' J., Winter 1980, at 17, 41); Scott & Derdeyn, *supra* note 15, at 476; Green, *supra* note 13, at 71.

33. Schulman, *supra* note 6, at 4. *See also* Comment, *supra* note 20, at 1107; Clingenpeel & Repucci, *supra* note 19, at 103; M. MORGENBESSER & N. NEHLS, *supra* note 31, at 78. *But cf.* Green, *supra* note 15, at 71.

34. Clawar, *supra* note 6, at 30. *See* M. MORGENBESSER & N. NEHLS, *supra* note 31, at 75; Steinman, Zemmelman & Knoblauch, *supra* note 7, at 561-62.

35. Robinson, *supra* note 11, at 651.

36. Scott & Derdeyn, *supra* note 12, examines at length the current legislative adoption of joint custody.

37. For analysis of effect of presumptions and preferences for joint custody on courts and parental custody prerogatives during divorce, *see generally id.*; Salfi & Cassady, *supra* note 11, at 248; Davidson & Gerlach, *Child Custody Disputes: The Children's Perspective*, *in* LEGAL RIGHTS OF CHILDREN 252 (R. Horowitz & Davidson eds. 1984); Moller, *Joint Custody: A Critical Analysis*, 14(1) TRIAL LAWYER'S Q. 36, 48, 49 (1982); Schulman & Pitt, *supra* note 6, at 554, 560; Zimmerman, *supra* note 28, at 26; Scott, *supra* note 3, at 78.

or because of judicial reluctance or inability to address the matter.[38] Also, it may have been submerged into supposedly "voluntary" agreements which have been rubberstamped by courts,[39] but which may in reality be the consequence of coercion or acrimonious bargaining between the parents and be patently adverse to the best interests of the children.[40] On the other hand, the issue simply may not exist at the time of the divorce.[41]

The success of joint custody depends upon more than parents trying to recover from an unsuccessful marriage and a legal and emotional divorce[42] and adopting the cooperative philosophy of joint custody. Parents must also continually grapple with and resolve their differences regarding the dynamics of the system as applied to their own and their children's changing expectations, attitudes, and needs. Parental differences as to scheduling, child-rearing, and financial arrangements, and the difficulties which accompany parental relocation and remarriage

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38. Joint custody may be the ideal vehicle for courts, aware of their limitations in predicting the future, to avoid the "agonizing choice" between parents. Miller, *supra* note 2, at 368, or as "an option preferable to the judicial toss of a coin." Comment, *supra* note 20, at 1119. *See also* M. WHEELER, DIVIDED CHILDREN 73, 86 (1980); Levy & Chambers, *supra* note 16, at 418.

39. As with any custody agreement between parents, in most cases, "judicial discretion is extremely limited and ratification will be forthcoming absent unusual circumstances." Scott & Derdeyn, *supra* note 12, at 475 n.95. *But cf.*, M. WHEELER, *supra* note 38, at 79. Acceptance of agreements by courts without scrutiny may be simply the result of inherent deficiencies in the system, such as caseload burdens, perfunctory divorce hearings in uncontested cases, and limited access to the children by the court.

40. Scott & Derdeyn, *supra* note 16, at 475, 480; Levy & Chambers, *supra* note 12, at 412; *Second Thoughts on Joint Custody*, 2 WOMEN & FAM. L. NEWSLETTER 3, 4 (Feb. 1981) (digest of article by Valerie Pitt). *Cf.* discussion of the same phenomenon in criticism of sole custody negotiations, Foster & Freed, *Law and the Family: Bargaining Leverage, Unfair Edge*, 192 L.Y. L.J. 6 (1984); Salfi & Cassady, *supra* note 11, at 33; M. ROMAN & W. HADDAD, *supra* note 4, at 167. *See also* Casasanto, *Guardians Ad Litem: A Proposal to Better Protect the Interests of Children of Divorce*, 20 N.H. B.J. 35, 42 (1978); Levin, *Guardian Ad Litem in a Family Court*, 34 MD. L. REV. 341, 348 n.41 (1974).

In states lacking policy provisions favoring co-parenting, certain parents, especially fathers, who desire to retain some control of their children's futures may be required to make unreasonably excessive concessions to reluctant spouses in order to obtain joint custody, a situation not propitious for future parental cooperation.

41. A particular parent's acquiescence to a court order or agreement for the joint custody arrangement may reflect that parent's wish to retain emotional ties with his or her ex-spouse. M. MORGENBESSER & N. NEHLS, *supra* note 31, at 77; Scheiner, Musetto & Cordier, *supra* note 19, at 139; to obtain frequent access to the ex-spouse for purposes of abuse, *see* Schulman, *supra* note 6, at 3; *Second Thoughts on Joint Custody*, *supra* note 40, at 4; to "delude the child that the marriage is not really over," M. WHEELER, *supra* note 38, at 73; or a means of "delaying the custody battle that was brewing away," Parley, *supra* note 6, at 314-15.

42. In the continuum of the divorcing process, parents must confront and resolve their "emotional divorce" after the legal divorce has been left behind. Grana, *Post Divorce Counseling: A Process for Implementing the Role of Separate-But-Joint Parent*, 21 J. FAM. L. 687, 697-98 (1982-1983). *See also* J. WALLERSTEIN & J. KELLY, *supra* note

"underscore the flexibility" inherently required in joint custody.[43] However, these differences likewise embody the potential for parents to be routed from the path of cooperation and communication for the benefit of the children.

Some mechanism must be found to check and diffuse parental hostility before it infects the entire joint custody family and before it has an adverse impact on the children. If such mechanism could also monitor families' adjustment to the joint custody framework, the prevalent pessimism of courts[44] and the outrage of critics toward joint custody could be finally validated or dispelled. If such mechanism's ultimate responsibility was also to protect the best interests of the children, the purported aim of all custody determinations, courts might be less wary of the joint custody alternative and become released from the "Catch 22" of "refusing to award joint custody because they have never seen it work, not knowing its potential for success because they have never awarded it."[45] Unless such a mechanism can be found, many children, parents, and courts will never know if there is a reality to the promised benefits of joint custody.

II. MEDIATION: MAKING JOINT CUSTODY WORK

A. *A Choice for Parents and Courts*

At first glance, parents who are at odds with one another regarding some facet of their joint custodianship appear to have two options: they can either put aside personal differences and compromise, or they may drag their dispute into court and risk its escalation into a bitter custody war. Of course, the initial option is preferable as it comports with the expectations inherent in the bestowal of joint custody on a family. The

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21, at 154; Scheiner, Musetto & Cordier, *supra* note 19, at 103; Clawar, *supra* note 6, at 31-32.

43. Folberg & Graham, *supra* note 2.

For a discussion of scheduling problems, *see* Green, *supra* note 15, at 70; Miller, *supra* note 2, at 400; of child-rearing problems, *see id.*; of financial problems, *see id.*; Patterson, *The Added Cost of Shared Lives*, 5(2) FAM. ADV. 10 (1982), *reprinted in* JOINT CUSTODY AND SHARED PARENTING 72 (J. Folberg ed. 1984); Schulman, *supra* note 6, at 3; Gardner, *supra* note 1, at 69; of relocation, *see* Miller, *supra* note 2, at 397; Steinman, *supra* note 7, at 411; Green, *supra* note 13, at 71; Folberg & Graham, *supra* note 2, at 561-62; of remarriage, *see* Miller, *supra* note 2, at 393, 394, 397; Grief & Simring, *Remarriage and Joint Custody*, CONCIL. CTS. REV., June 1982, at 9.

For anecdotal advice on how parents can deal with these and other events which may pose a threat to a cooperative custody relationship, *see generally* I. RICCI *supra* note 15.

44. Folberg & Graham, *supra* note 2, at 546.

45. M. WHEELER, *supra* note 38, at 75. *See also* Green, *supra* note 13, at 70.

latter option, however, may be what happens in fact.[46] Modification proceedings, from a judicial policy perspective, would confirm that joint custody is not a final solution[47] to the custody issue and would increase judicial reluctance to award joint custody. From a practical perspective centering on the family, where all analyses should begin, modification proceedings would be devastating, making future shared custody or parenting for the individual family in most cases impossible. When cooperation and communication yield to parental hostility, the courts are fortunately not the only resource parents may utilize to correct the situation. Parents and courts must be alert to the alternatives available.

Modification proceedings for joint custody families may irreparably damage the potential for parental cooperation in whichever custody arrangement follows.[48] When joint custodians opt for additional litigation over cooperation, a neverending custody struggle may ensue, even more bitterly contested than the original custody question.[49] Many parents may not have returned to court with the intention to dispute the fundamental custody issue. Many, if not most, having originally "agreed" to joint custody, may have no idea of the risks to which they expose themselves and their children in opening the Pandora's box of custody litigation. Yet, because a court has already determined joint custody is in the best interests of the children, in order to challenge this conclusion, parents may be forced to charge one another with "unfitness or unfair treatment" in order to prevail.[50] With escalation of the conflict, psychological and emotional problems may be expected. For families financially troubled from maintenance of joint custody arrangements, the

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46. *See* Ilfield, Ilfield & Alexander, *Does Joint Custody Work? A First Look at Outcome Data of Relitigation*, 139(1) AM. J. PSYCHIATRY 62, 64 (Jan. 1981) (results of a two year study indicated "the proportion of relitigation for joint custody families was one-half that of exclusive custody families."); Phear, Beck, Hauser, Clark & Whitney, *supra* note 28, at 153-55 (using a different population and sampling method from Ilfield, Ilfield and Alexander, the authors found "no significant difference in the overall frequency with which [joint custody and sole custody families] returned to court."). Note, however, that in a more detailed study of some of the cases joint custodians returned more frequently for modifications than other parents but not as often for contempt proceedings. *Id.* at 154-55.

47. *See, e.g.*, Skoloff, *supra* note 29, at 54; Comment, *Joint Custody*, *supra* note 20, at 1109 ("[A]n award of joint custody merely postpones the inevitable decision of which parent will acquire sole custody."), *citing* Bodenheimer, *Progress Under the Uniform Child Custody Jurisdiction Act and Remaining Problems: Punitive Decrees, Joint Custody and Exessive Modifications* 65 CALIF. L. REV. 978, 1011 (1977).

48. Note that some jurisdictions permit modification of joint custody plans at any time upon the *agreement of both parents. See, e.g.*, OHIO REV. CODE ANN. § 3109.04 (Baldwin Supp. 1987). According to § 3109.04 (B)(2)(6), a court may modify the joint custody decree "upon the request of one or both of the joint custodians." *Id.* at § 3109.04 (B)(2)(b). It is doubtful this kind of proceeding will threaten the survival of the joint custody arrangement in the absence of detriment to the child. The situation described below is where there is an *absence of agreement* between parents. A discussion of the

financial burdens of additional litigation may be overwhelming.[51] Finally, and most importantly, these proceedings, purportedly intended to protect the children's best interests, may have the reverse effect.[52] Children may be left with uncertainty as to their futures and may again face instability from loss of, or shifting of, environments and parental models.[53] Though parental acrimony giving rise to divorce rarely has anything to do with the children,[54] when joint custody breaks down, it focuses primarily on the children.[55] When parents cannot cooperate and require outside assistance to resolve disputes regarding the future of the shared custody relationship, one can picture few settings worse than the courts for the airing of grievances, protecting the children's best interests, and, especially, fostering of future parental cooperation.[56]

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various standards employed by courts in modification proceedings can be found in Wexler, *Rethinking the Modification of Child Custody Decrees*, 94 YALE L.J. 757, 760-84 (1985).

49. Green, *supra* note 13, at 68.

50. Axelrod, Everett & Haralambie, *Joint Custody*, in HANDLING CHILD CUSTODY CASES 92 (A. Haralambie ed. 1983).

In the initial proceeding, one parent might prevail by showing the other parent's lack of interest, lack of financial ability, or limited contact with the children.

51. *See* Note, *Non-Judicial Resolution of Custody and Visitation Disputes*, 12 U.C.D. L. REV. 582, 587 (1979).

52. M. WHEELER, *supra* note 38, at 177.

53. *Id.* at 177, 198; "When a child is kept suspended, never quite knowing what will happen next, he may likewise suspend the shaping of his personality...one of the greatest risks which current procedures pose for children." *Id.* at 198, *quoting* Psychiatrist Andrew Watson.

Note, however, one practical advantage of joint custody is that if such permanent shifting of environments is necessary, joint custody children, unlike those of sole custody, will have "developed a comfortable relationship" with both parents, making such disruptions perhaps less traumatic. *See* Miller, *supra* note 2, at 363. Logically, however, severance of post-divorce intimate ties with the other parent may be twice as stressful.

54. *See* Kelly, *supra* note 19, at 43; Green, *supra* note 15, at 69; Salfi & Cassady, *supra* note 11, at 37.

55. *See* Skoloff, *supra* note 29, at 54 (children with guilt, "witness and become part of the litigation process, viewing themselves as the root of the hostilities."); Moller, *supra* note 37, at 45 (describing the children's "double burden" of contending not only with the collapse of their parents' marriage, but with the failure of the divorce "to alleviate the stresses" the former created).

56. Steinman, Zemmelman & Knoblauch, *supra* note 7, at 558, draw a direct line between the amount of court involvement in the joint custody family and the success of the arrangements, i.e., "the degree to which the court influenced the joint custody arrangement was negatively related to outcome."

Professor Robert J. Levy asserts that generalizations are inappropriate because "continuing litigation may be, at least for some couples, a 'healthy adaptation.'" He suggests that some couples "must be so full of interpersonal venom that: (a) they would never permit a professional to 'mediate' their differences; (b) their relitigation are symbolic spousal batterings which can take the place of physical assaults; or, (c) their children do 'better' when the parents are litigating because so long as they are fighting each other in court they do not fight with the children at home." Levy, *Comment on the Pearson-Thoennes Study and on Mediation*, 17 FAM. L. Q. 525, 532 (1984).

The "enforced antagonism" of the adversary system and the "judicial imposition of a rigid, external structure"[57] upon the family cannot help but undermine parental cooperation and flexibility. Even in the unlikely event that joint custody survives a modification proceeding in the courts,[58] the courthouse doors may find themselves revolving with the same parents again in a matter of time. No precedent has been provided "for flexibility or cooperative modification ... in the future, should circumstances change."[59] Parents must learn to cooperate and communicate after divorce for the sake of the children, but without exploitation of the children.[60] No one suggests, however, that the discipline required for this effort[61] will not, at times of tension and emotional turmoil, need buttressing with outside assistance.[62] In fact, "whatever custody arrangement a couple adopts, the chances are they will need help in making it work."[63]

Reforms within the adversary system have been suggested to ameliorate problems created by judicial resolution of parental conflicts.[64] However, it has become apparent that non-judicial and "non-adversary approaches ... offer a more constructive method of family dispute resolution."[65] Joint custody commentators are nearly unanimous in the belief that every joint custody plan should provide for an external non-

57. Comment, *supra* note 20, at 1123. *See* Robinson, *supra* note 11, at 680.

58. W. WISHARD & L. WISHARD, MEN'S RIGHTS 212 (1980); M. WHEELER, *supra* note 38, at 83.

59. D. SAPOSNEK, *supra* note 32, at 98. *See also* Steinman, Zemmelman & Knoblauch, *supra* note 7, at 554 ("Laws that prefer or presume joint custody when parents are in dispute have created a population of parents who come to joint custody without the initial motivation and commitment to make it work.").

60. Clawar, *supra* note 6, at 38; Johnston, *supra* note 6, at 12; Salfi & Cassady, *supra* note 11, at 36; W. WISHARD & L. WISHARD, *supra* note 58, at 211.

61. Foster & Freed, *supra* note 17, at 24.

62. Spencer & Zammitt, *supra* note 24, at 933 ("parents functioning in the emotionally charged atmosphere of a marital dispute may need assistance in distinguishing the child's best interests from their own natural possessory interests in the child."). Note that an absence of "ability of the parties to engage in constructive negotiations," especially in "emotionally charged disputes" where "the parties have a strong interest in settlement," has been regarded as a prime factor urging the use of a mediator. N. ROGERS & R. SALEM, A STUDENT'S GUIDE TO MEDIATION AND THE LAW 41-58 (1987).

63. Roman & Haddad, *supra* note 4, at 167. *See* Clawar, *supra* note 6, at 38; D. SAPOSNEK, *supra* note 32, at 21.

64. *Non-Judicial Resolution*, *supra* note 51, at 587 (legal representation of children, social investigations, mental health professionals as experts).

65. *Id.* at 583.

66. *See, e.g.*, Note, *supra* note 19, at 17; W. WISHARD & L. WISHARD, *supra* note 58, at 212; Clawar, *supra* note 6, at 33; M. MORGENBESSER & N. NEHLS, *supra* note 31, at 102; Salfi & Cassady, *supra* note 11, at 24; Ilfield, Ilfield & Alexander, *supra* note 46, at 65; Clingenpeel & Repucci, *supra* note 19, at 78; Robinson, *supra* note 11, at 655; Gaddis, *supra* note 15, at 20; M. WHEELER, *supra* note 38, at 82.

In reality, few parents may actually include such provisions in their agreements. *See* Phear, Beck, Hauser, Clark & Whitney, *supra* note 28, at 154 (less than 10%).

adversarial mechanism for parents to utilize before discord draws them back into court.[66] Although these non-judicial measures may lack the protections of individual rights potentially present in litigation, values consonant with the joint custody system substitute and promise effective revitalization of parental cooperation and communication with their application.[67] There is an urgent need for alternative dispute resolution mechanisms: "To compel joint custodians to submit all disputes over child rearing to a judge verges on the absurd."[68]

One alternative system of dispute resolution provides precisely the precedent required for future cooperation and communication between joint custodians, for it focuses exclusively upon obtaining that end.[69] The system is mediation. Simply defined, "mediation is a process in which an impartial intervenor assists the parties in conflict to reach a voluntary settlement of their differences through an agreement that defines their future behavior."[70] Mediation has already developed integral ties with the joint custody phenomenon: the practice of divorce and custody mediation has noticeably contributed to increased parental adoption of the joint custody format,[71] and post-divorce mediation,[72] or some variation of it,[73] has been the most frequently recommended solution to the troubles which disturb joint custody relationships.

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67. Note that the opponents of joint custody do not deny the efficacy of these tools to promote harmony between parents. However, they still maintain that these tools should be used to "facilitate co-parenting rather than joint custody....The fate of children should not rest on [the] possibility of success." Levy & Chambers, *supra* note 6.

68. Miller, *supra* note 2, at 401. *See also* Skoloff, *supra* note 29, at 53; Pogue v. Pogue, 147 N.J. Super. 61, 63, 370 A.2d 539, 540 (Ch. Div. 1977) ("[W]hen communication between the parents breaks down, the court cannot be asked to decide questions of routine discipline.").

69. Coombs, *Noncourt-Connected Mediation and Counseling in Child Custody Disputes*, 17 FAM. L.Q. 469, 470 (1984). "Although specific techniques of mediation may vary considerably, the mediator's focus on mutual interest, increased communication, and a peaceful result is constant." *Id.* (footnotes omitted).

70. R. SALEM, MEDIATION: THE CONCEPT AND THE PROCESS 50 (1984).

71. Dullea, *Turning to Mediation to Settle a Divorce*, N.Y. Times, Oct. 8, 1984, at C12, col. 2. "Most parents who mediate end up agreeing on some form of joint custody." *Id.*, *quoting*, Doris Jonas Freed, legal scholar and expert in child custody; Pearson & Thoennes, *Mediating and Litigating Custody Disputes: A Longitudinal Evaluation*, 17 FAM. L.Q. 497, 506 (1984). "Nearly 70 percent of those who reached agreements in mediation opt for joint legal custody....Joint custody characterizes fewer than 30 percent of non-mediated outcomes." *Id. See Why Joint Custody Doesn't Always Work*, *supra* note 28, at 541 n.116. "In Connecticut a study of the disposition of 221 contested custody cases referred for mediation in the fiscal year 1977-1978 showed that in 10% of the mediated cases the couples entered into a shared custody arrangement." Letter from A. Salus, Dir., Sup. Ct. Fam. Div., Connecticut to authors (Feb. 15, 1979).

Note that Steinman, Zemmelman & Knoblauch, *supra* note 7, indirectly suggest a correlation between success in mediation and success in joint custody arrangements. *Id.* at 558.

72. Foster & Freed, *supra* note 17, at 24; Clawar, *supra* note 6, at 33; J. FOLBERG & A. TAYLOR, MEDIATION: A COMPREHENSIVE GUIDE TO RESOLVING CONFLICTS WITH-

Mediation offers joint custodians several distinct advantages to traditional judicial dispute resolution. Mediation is faster and less expensive than litigation.[74] Mediation removes the family squabble from the public arena and offers a neutral third party to facilitate resolution. The mediator, unlike the court, has no coercive power,[75] but returns decision-making responsibility to the hands of the parents to allow them to voluntarily agree on solutions to their problems.[76] Cooperative decision-making, without the prospect of winners or losers, or subtle or overt evaluations of parental fitness, extinguishes the adversarial flames which tend to polarize parents. It promotes unique and mutually satisfying solutions to families' peculiar problems.[77] Although a parent may challenge in court a mediated decision,[78] the greater self-determination and privacy afforded by the cooperative process may make resort to external and arbitrary decision-makers less likely.[79] Families are not asked to conform their attitudes and behavior to external expectations, norms, rules, or structures, but are given the freedom and opportunity to

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OUT LITIGATION 162, 184 (1984); Scott, *supra* note 3, at 78-79. "Joint custody could take away a lot of leverage from women if there is not 'a process of mediation to balance the terrible inequity and power distribution found in most relationships.'" *Id., quoting* psychologist and mediator M. Ruman; D. SAPOSNEK, *supra* note 32, at 21. *See also supra* note 66 and authorities cited therein.

Some authors recommend without reservation that mediation be attempted in every custody dispute where parents "fail to privately agree." L. KIEFER, HOW TO WIN CUSTODY 45 (1982) (proviso included for parents not to trust mediation).

73. Some joint custody commentators have recommended a variation on the mediation formula which combines mediation and arbitration. The parents refer their dispute first to mediation and then, if mediation is unsuccessful, to arbitration, presumably by the same individual who mediated the matter. *See* Gaddis, *supra* note 15, at 20 (sample clause); Spencer & Zammit, *supra* note 24; M. MORGENBESSER & N. NEHLS, *supra* note 31, at 102. Note that employment of such dual dispute resolution mechanisms is not unique to joint custody, but is found in other areas of the law and is known as "medarb." *See* N. ROGERS & R. SALEM, *supra* note 62, at 248.

Conciliation, *see infra* note 123, is also sometimes recommended as a follow-up procedure to unsuccessful mediation. *See* Robinson, *supra* note 11, at 655 n.35.

74. *See* Dullea, *supra* note 71, at C12; Axelrod, Everett, & Haralambie, *supra* note 50, at 42; *See* D. SAPOSNEK, *supra* note 32, at 22. ("California's mandatory mediation process costs only *one fourth* as much as a trial would for resolving custody and visitation issues." *Id., citing* H. McIsaac, *Mandatory Conciliation Custody/Visitation Matters: California's Bold Stroke*, 19(2) CONCIL. CTS. REV. 73 (1981)); Pearson & Theonnes, *supra* note 71, at 499.

75. Sander, *Varieties of Dispute Processing*, 70 F.R.D. 111 (1976); Spencer & Zammit, *supra* note 24, at 932.

76. Spencer & Zammit, *supra* note 24, at 932; M. MORGENBESSER & N. NEHLS, *supra* note 31, at 102; *Non-Judicial Resolution*, *supra* note 51, at 593, 597; Salem, *supra* note 70, at 51.

77. Riskin, *Mediation and Lawyers*, 43 OHIO ST. L.J. 29, 34; Coombs, *supra* note 69, at 460.

78. M. MORGENBESSER & N. NEHLS, *supra* note 31, at 102. *See* DeJong, Goolkasian & McGillis, *The Use of Mediation and Arbitration in Small Claims Disputes* (Nat. Inst. of Justice, U.S. Dept. of Justice 1983).

79. *Non-Judicial Resolution*, *supra* note 51, at 593-94, 597.

construct or disassemble their joint custody relationships according to their own needs, ambitions, or creative imaginations.[80]

B. *Healing Joint Custody with Mediation*

Mediation may be the ideal vehicle for resolution of joint custodial disputes since it advances a philosophy and strives to attain similar goals as those found within the joint custody framework. As with joint custody, which seeks to carry parents beyond their interpersonal hostility toward a new family harmony and flexibility with focus on the children, mediation's "central quality" is "its capacity to reorient the parties toward each other ... by helping them to achieve a new and shared perception of their relationship, a perception that will redirect their attitudes and disposition toward one another."[81] Both systems, joint custody and mediation, are disdainful of the suffocating effect of rules and structures imposed upon the internal workings of a family by authoritarian outsiders.[82] Both aim to eliminate external interference and "substitute a more fluid sense of mutual trust and shared responsibility" to define parental interaction.[83]

Child custody mediation, however, does not only seek to "reduce spousal acrimony and increase cooperative decision-making"; some mediators emphasize its *maximization of children's access to both parents*,[84]

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80. *See* Fuller, *Mediation-Its Forms and Functions*, 44 S. CAL. L. REV. 305, 308. ("Mediation is commonly directed, not toward achieving conformity to norms, but toward the creation of the relevant norms themselves."); Riskin, *supra* note 77, at 34. "[M]ediation is less learned-in by...certain assumptions that dominate the adversary process." *Id.*

81. Fuller, *supra* note 80, at 325.

Some joint custody commentators suggest that merely by virtue of the existence of the arrangement between ex-spouses, even if imposed upon hostile parents, a shifting of parental attitudes and behavior from conflict toward cooperation or at least "detente" will occur. *See* Grief, *supra* note 18, at 33; Miller, *supra* note 2, at 364; Folberg & Graham, *supra* note 2, at 554; Parley, *supra* note 6, at 315.

82. Fuller, *supra* note 80, at 331. "The inappropriateness of formal, act-oriented rules as a means of organizing the internal affairs of a marriage can be rested on two grounds; *first*, that a 'legalistic' conception of the relationship would be destructive of the spirit of mutual trust and confidence essential for the success of a marriage; second, that the shifting contingencies of married life—illness, pregnancy, loss of job, the necessity of housing an indigent relative, etc.—would require reading so many tacit exceptions into the rules that they would, in any event, forfeit their efficacy as an organizing principle of the relationship." *Id.*

83. *Id.* at 326. *See* D. SAPOSNEK, *supra* note 32, at 21. ("Mediation is the ideal format for [joint custody] negotiations, since it rests on the principle of cooperative sharing.").

Joint custody may be described as "an ideal, a policy, and a set of expectations," Steinman, *supra* note 6, at 740, to create a "philosophy of trust and cooperation wherein the nonexclusive rights of the parties can be negotiated to fit the precise circumstances of a particular case." Gaddis, *supra* note 15, at 18. *See also* Foster & Freed, *supra* note 17, at 24.

84. D. SAPOSNEK, *supra* note 32, at 107. "The mediator tries to implement a plan that allows the child a regular and continuous relationship with both parents. Generally,

thus in full accord with the nature of joint custody. That mediation regards children's continued contact with both parents as an essential goal of its process is really not surprising, for both joint child custody and mediation are merely reactions in kind to the deplorable effects of parental combat on children[85] and to the general trauma undergone by children when parents go through a divorce.[86] The striking parallels which may be drawn between joint custody and mediation urge an attempt to combine the two devices in the post-divorce setting for resolution of joint custodial disputes.[87] Together, they can greatly strengthen the prospect for successful joint custodial parenting.

Mediation provides parents with an opportunity to retain a sense of autonomy and self-determination imparted by joint custody for the governance or post-divorce family affairs.[88] Because parents remain the ultimate authorities on the direction and nature of their family's future, much as if there had never been a divorce,[89] they are less prone to feelings of bitterness and helplessness as might be created by "the capriciousness of ... the judicial dice throw,"[90] or by the intrusion of stifling judicial biases, principles, or precedents upon their unique family problems.[91] One function of the mediator is to emphasize, "that, if the matter is settled 'within the family,' the decision will reflect their common values."[92] There is no doubt that "parents and children must live with

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the mediator must assume that...both parents are adequate to be caregivers to their child and both have important individual contributions to make to the rearing of their child." *Id.* at 259. *See also* J. FOLBERG & A. TAYLOR, *supra* note 72, at 179.

85. Grana, *supra* note 42, at 687-88; Pearson & Thoennes, *supra* note 71, at 499 ("[I]mprove the dismal child support payment performance... and encourage visitation.").

86. Coombs, *supra* note 69, at 469. *See* D. SAPOSNEK, *supra* note 32, at 2 ("Child custody mediation is an alternative approach for resolving custody disputes in a way that is most congruent with our current knowledge of the needs and development of children of divorce.").

87. In Fuller, *supra* note 80, Professor Lon Fuller sets out in his influential article, *Mediation—Its Forms and Functions* "several characteristics of the labor-management relationships which make mediation a particularly appropriate mechanism in that context." *Id.* It has been noted that "three of these traits are also found in post-marital problems: (1) a dyadic relationship in which (2) the parties must reach an agreement in order to preserve their control over their common actions and in which (3) the agreement reached by the parties will help to define their future interactions." Spencer & Zammit, *supra* note 24, at 932, n.87.

88. Dullea, *supra* note 71, at 12.

89. *See* Riskin, *supra* note 77, at 34; Axelrod, Everett & Haralambie, *supra* note 50. "It makes the family, rather than the legal system, become the place of *first resort*, providing parental control over issues which will influence the family members' lives." *Id.*

90. Comment, *supra* note 20, at 1110 n.176.

91. *Non-Judicial Resolution*, *supra* note 51, at 586, 594; Riskin, *supra* note 78, at 34; M. WHEELER, *supra* note 38, at 206. *See also* Comment, *supra* note 20, at 1086.

92. Spencer & Zammit, *supra* note 24, at 932.

the ... decision made, and are much more likely to successfully implement an arrangement arrived at through their own decision-making process than one imposed on them by the court."[93]

Private decision-making is fundamental not only for joint custody arrangements[94] but for all domestic disputes: "Including privacy helps quell feelings of embarassment and inadequacy on the part of parents and reduces the negative impact of familial disputes upon children."[95] The mediator must always remain impartial between the parents,[96] since his or her "effectiveness will depend upon [the] ability to establish a relationship of trust and confidence" with the parents.[97] Removed from an adversarial forum and without public record, the mediation begins with assurances by the mediator of the confidentiality of the sessions, unless disclosure is required by law or unless prior consent to disclosure is obtained from the participants.[98] Some parents may agree in writing to waive all rights to call the mediator as a witness in any subsequent related proceeding.[99] Ideally, the only public indicia, if any, of a dispute between parents and its ultimate resolution in mediation will be a written agreement found by a court to be in the best interests of the children and incorporated into the original decree.[100]

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93. Robinson, *supra* note 11, at 682. *See* Sander, *supra* note 75, at 120 ("[S]uch solution is likely to be far more acceptable...and hence durable.").

94. Gaddis, *supra* note 15, at 932.

95. Spencer & Zammit, *supra* note 24, at 919.

96. *See* ABA STANDARDS OF PRACTICE FOR LAWYER MEDIATORS IN FAMILY DISPUTES, BNA FAM. L. REP. & TAX GUIDE (8/3/84) [hereinafter STANDARDS FOR LAWYER MEDIATORS].

97. Spencer & Zammit, *supra* note 24, at 933 n.88. *See* R. Salem, *supra* note 70, at 55-56; Axelrod, Everett & Haralambie, *supra* note 50, at 42 ("[A]ll mediation contemplates the use of an impartial and trusted third party....").

98. STANDARDS FOR LAWYER MEDIATORS, *supra* note 96, at Standard II, "spec. consid." A.

The private mediator, as of yet, has no privilege recognized to quash a subpoena issued to obtain his or her testimony. Moreover, the mediator may have a statutory obligation to come forward and disclose child abuse or felonies. In certain instances, additionally, a duty to warn may arise under tort law by virtue of the confidential or fiduciary relationship created during mediation. The mediator may wish to describe these obligations to the parents before mediation begins. *See* J. FOLBERG & A. TAYLOR, *supra* note 72, at 183-84.

99. *See Non-Judicial Resolution*, *supra* note 51, at 595; Coombs, *supra* note 69, at 476, 491.

The same public policy which voids parental contracts for binding arbitration of child custody disputes may override parental agreement here. Courts do not wish to see the children's best interests bargained away by contract. Axelrod, Everett & Haralambie, *supra* note 50; Spencer & Zammit, *supra* note 129, at 925, 929. *But cf.* Comment, *supra* note 20, at 1122 (recent cases upholding arbitrated decisions); Robinson, *supra* note 11, at 655 n.35 (citing O.J. Coogler, suggesting courts will uphold such decisions).

100. *See* OHIO REV. CODE ANN. § 3109.04(B)(2)(b) (Baldwin Supp. 1987). *See also* *supra* note 48 and discussion contained therein.

A "continuing relationship" between parties in conflict is regarded as another significant factor urging mediation as an appropriate means of dispute resolution.[101] Adjudicatory processes which encourage adversarial, public posturing which creates divisiveness between parents can only undermine the prospects for future cooperation in long-term relationships.[102] Joint custodians, regardless of the outcome of their particular dispute, must continue to interact as parents, if not as joint decision-makers, and mediation provides the "opportunity to nurture" this post-divorce relationship,[103] that is, "to alleviate the long-run tensions as well as resolve the immediate controversy."[104] Since it is minimally disruptive to the long term interdependent relationships in the family, mediation offers a clear advantage over other dispute resolution processes.

Mediation may also have a greater ability relative to other forms of dispute resolution to uncover and resolve underlying controversies which divide joint custodians. Unlike adjudication, with its narrow, rule-oriented approach which "treats every surface symptom as an isolated event," mediation examines underlying needs and interests of the family even though these might not be significant in the courts.[105] For example, emotional trauma over the divorce or other unfinished business from the marriage, as well as resentment over social or financial advantages of an ex-spouse, may be the actual cause of parental conflict. Although commentators differ as to the proper methods of dealing with these issues, supposedly ancillary to the dispute over the children,[106] there is little doubt that, in general, mediation utilizes the greatest variety of tools to resolve underlying tensions while addressing the "surface" issues at hand.[107]

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101. N. ROGERS & R. SALEM, *supra* note 62, at 49-50.

102. *See id. See also* Folberg & Graham, *supra* note 2, at 549; Salfi & Cassady, *supra* note 11, at 33-34.

103. Coombs, *supra* note 69, at 469; M. WHEELER, *supra* note 38, at 207.

104. Sander, *supra* note 75, at 121.

105. *Id.*, at 120. *See also* Riskin, *supra* note 77, at 34 ("[W]hatever a party deems relevant is relevant."); N. ROGERS & R. SALEM, *supra* note 62, at 27, 44.

106. Although most commentators discuss this problem in the context of divorce mediation, their divergent approaches may be equally applicable in post-divorce mediation. Some writers contend that any line drawn between custody issues and other ones is "artificial" and that all "interrelated aspects of... conflict should be resolved *together*." J. FOLBERG & A. TAYLOR, *supra* note 72, at 168. Others suggest leaving financial and other such issues to attorneys, Hopkins, *Evaluative Mediation, Upholding the Child's Best Interests*, 20 CONCIL. CTS. REV. 63, 67-68 (Dec. 1982), or severing them totally from discussion of the children. Coombs, *supra* note 69, at 471, 475. Specifically addressing the problem of dealing with parents' emotionality in mediation, one mediator comments: "Resolutions to the emotional problems presented in mediation may be forthcoming *after* an agreement is reached, but not before. It is only when couples begin to behave in trustworthy and trusting ways that they can begin to develop insight about themselves and each other." D. SAPOSNEK, *supra* note 32, at 178.

107. Fuller, *supra* note 80, at 309.

C. *The Role of the Mediator*

The mediator, employing a wide variety of techniques and strategies,[108] guides parents toward development of solutions for their own unique problems. The techniques employed may vary according to the particular mediator, participants, or dispute involved, and may range from simply setting basic ground rules for the mediation process[109] or caucusing[110] to complex strategies, such as role playing.[111] Certain elementary ingredients of mediation, however, can be distilled for successful mediation in general, especially in the joint custody context.

An essential role the mediator assumes in the course of dispute resolution is that of fact finder/educator, a multi-leveled function. As fact finder, the mediator must gather "sufficiant information from the participants so they can mutually define the issues to be resolved in mediation."[112] Skillful fact finding may reduce "inequalities of power brought about by lack of information regarding family finances, the legal process, typical postdivorce reactions, or the developmental needs of the children."[113] If the mediator as fact-finder is mutually respected by the parents, an "independent appraisal of their respective positions will often be difficult to reject" and thereby "may be a potent tool for inducing settlement."[114] This appraisal or educative analysis may simply delineate the participants' separate and mutual needs and interests,[115] or may even extend to recommendations for outside expert consultations "in the event that it appears that additional knowledge or understanding is necessary for balanced negotiations."[116] It has been suggested that the mediator should be equipped to educate parents on "basic principles of child psychology and family dynamics,"[117] although therapy or counseling is clearly a distinct process from mediation, and this function may be performed by outside experts.[118] Educating parents about the

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108. This paper will not explore in depth the various techniques and strategies mediators may use to create consensus during mediation. For analysis and advice, *see generally* D. SAPOSNEK, *supra* note 32; F. BENENFIELD, CHILD CUSTODY MEDIATION (1984).

109. *See, e.g.*, D. SAPOSNEK, *supra* note 32, at 70; Scheiner, Musetto & Cordier, *supra* note 19, at 103; Coombs, *supra* note 69, at 475.

110. *See* Riskin, *supra* note 77, at 35; Coombs, *supra* note 69, at 474-75.

111. *See* Coombs, *supra* note 69, at 475.

112. STANDARDS OF PRACTICE FOR FAMILY MEDIATORS, 17 FAM. L.Q. 455, 456 [hereinafter STANDARDS FOR FAMILY MEDIATORS]. *See also id.* at 458.

113. J. FOLBERG & A. TAYLOR, *supra* note 72, at 185. *See also* Sander, *supra* note 75, at 117.

114. Sander, *supra* note 75, at 116.

115. *See* Riskin, *supra* note 77, at 34.

116. STANDARDS FOR FAMILY MEDIATORS, *supra* note 112, at 458.

117. *Non-Judicial Resolution, supra* note 51, at 593. *See also* D. SAPOSNEK, *supra* note 32, at 37 ("Child custody mediators who are not specifically trained in these areas may seriously compromise the benefits of child custody mediation.").

118. *See, e.g.*, STANDARDS FOR FAMILY MEDIATORS, *supra* note 112, at 455; J. FOLBERG & A. TAYLOR, *supra* note 72, at 158.

"harm inflicted on the children during the divorce process" may reinforce or create an "openness" and "willingness to change" in parents which then may be employed to "help parents diffuse their anger and resolve underlying emotional issues."[119] The mediator is obligated, additionally, to define mediation in the larger context of all procedural alternatives available to parents.[120] Thus, the mediator can help the family to "realistically assess the financial and emotional costs" of opting for litigation over cooperation.[121]

Education becomes subtle persuasion,[122] and mediation therefore may become a form of conciliation.[123] Although a mediator may be reluctant to offer legal advice,[124] he or she may, in order to effect compromise, remind recalcitrant joint custodians that litigation of their dispute may bring application in the courts of various statutory or judicial policies—such as friendly parent provisions,[125] legal preferences for joint custody,

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119. *Non-Judicial Resolution, supra* note 51, at 594.

120. This may be *required* at the beginning or end of each mediation process, or both. *See* STANDARDS FOR FAMILY MEDIATORS, *supra* note 112, at 455, 459.

121. *Non-Judicial Resolution, supra* note 51, at 593.

122. *See* D. SAPOSNEK, *supra* note 32, at 190. "For example, a mediator may be able to facilitate an agreement by supplying vivid stories of other couples' traumatic experiences of court custody battles, of their near financial ruin from lawyers' fees and court-related expenses, of the damaging psychological effects to children of testifying in court, and of the endless cycle of court battles, which typically repeat year after year." *Id.*

123. "Conciliation" may actually be the more appropriate term for the process referred to in this article as mediation, although "in common usage, the distinctions between the two have become blurred." N. ROGERS & R. SALEM, *supra* note 62, at 248. "In *conciliation*, the conciliator is a neutral third person who offers options for the parties to consider, points out the advantages and disadvantages of each, and encourages the parties to adopt one of the available options...." Robinson, *supra* note 11, at 656 n.35. Therefore, the conciliator takes a more active or directive role in dispute resolution than the mediator. *See* Hopkins, *supra* note 106, at 63. In the family law context the distinction between conciliation and mediation has been described in the following manner:

> Conciliation begins with the goal of reconciling the spouses if at all possible...minimizing the conflicts in the divorce and assisting the parents in cooperating with each other for the interests of the children. Thus, conciliation is a therapeutic intervention in the family. Mediation, on the other hand, assists the parents in coming to specific agreements with respect to the issues of litigation and in drafting those agreements in written form for presentation to the court. Thus, mediation is a therapeutically oriented legal intervention in the family.

Axelrod, Everett & Haralambie, *supra* note 50, at 47 (footnotes omitted).

Although reconciliation of the marriage is certainly not within the contemplation of joint custody mediation, the other objectives of conciliation are.

124. *See* STANDARDS FOR FAMILY MEDIATORS, *supra* note 112, at 458; Coombs, *supra* note 69, at 475.

125. A "Friendly Parent" provision, a term coined by Schulman & Pitt, *supra* note 6, at 554, is a statutory directive to courts that in the event joint custody is denied, sole custody is to be awarded to the parent most likely to encourage frequent contact between the non-custodian and the children. The philosophy, if not the effect, *see* Scott & Derdeyn, *supra* note 12, at 479; Axelrod, Everett & Haralambie, *supra* note 50, at 54-55; Scott,

judicial biases favoring mothers or remarried fathers,[126] or merely judicial impatience with modification proceedings. Some mediators, "may even apply economic, social, or moral pressure to achieve 'voluntary' agreement."[127] Even if the mediator assumes the more common, passive role of a go-between, merely "keeping open lines of communication,"[128] the mediator may still be required to "point out overreaching, unfairness, or inappropriate proposals,"[129] and to "keep the issue open and the discussion focused until another solution can be found that considers more variables."[130] This function of the mediator—to expand the resources available to parents, or "to convert zero-sum games into non-zero-sum games"[131]—may include the strategical offering of options by

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supra note 3, at 78, of such a provision has been approved by sole custody and joint custody advocates alike. *See, e.g.*, J. GOLDSTEIN, A. FREUD & A. SOLNIT, *supra* note 6, at 118 ("[T]o accord with the continuity guideline"); Controneo, *supra* note 20, at 351; Robinson, *supra* note 11, at 683; Salfi & Cassady, *supra* note 11, at 36; Trombetta, *supra* note 21, at 223. "By contrast, under today's custom of choosing between parents, control tends to go to the parent who is most adamant about excluding the other, mounts the strongest courtroom battle and is least open to the idea of co-parenting." *Id.*

126. As for judicial preferences for maternal custody, *see* M. ROMAN & W. HADDAD, *supra* note 4, at 163-66; Grief, *supra* note 18, at 32; Scott & Derdyn, *supra* note 10, at 468; Moller, *supra* note 37, at 43. The figures for the dismal success of fathers in the contested custody cases are rarely disputed. *See* Miller, *supra* note 2, at 354 (10%); Phear, Beck, Hauser, Clark & Whitney, *supra* note 28, at 155 ("Maternal requests for sole custody were realized twice as often as paternal requests"); Comment, *supra* note 20, at 1119, n.177 (quoting *Statistics from the American Society of Divorced Men*, 4 FAM. L. REP. 2456 (1978)) ("[I]f both parents are equally fit...the man will win 20% of the cases. If...the mother is unfit, the father has an even chance at prevailing.") Nonetheless, there are those who argue the fathers' chances of winning custody are better than the mothers' and that "close to two-thirds...of the fathers who requested custody were awarded it." Schulman, *supra* note 6, at 4. Here, by examining authorities, the division between men's and women's rights groups on the issue of the need for joint custody is apparent.

It should be noted that joint custody may eliminate one problem which sole custody mothers confront when their spouses remarry. Courts will on occasion prefer the two-parent home with a father figure over the working single mother with a boyfriend sole custody arrangement and thereby shift sole custody to the father upon his remarriage. Hendrickson & Schulman, *Trends in Child Custody Law: What They Mean for Women*, 20, 24-26 (Sept. 10, 1981) (available from National Center on Women and Family Law). Joint custody may reduce the likelihood of this occurrence, as the original "family," with both the father and the mother remaining prominent in the children's lives, is retained after the divorce and remarriage. Moreover, joint custody may reduce the chance that either parent's spouse can successfully adopt the children over the veto of the other parent. Miller, *supra* note 2, at 394.

127. Riskin, *supra* note 77, at 36 (footnotes omitted).

128. *Id.* at 35.

129. Axelrod, Everett & Haralambie, *supra* note 50, at 42. *See* J. FOLBERG & A. TAYLOR, *supra* note 72, at 150-51. *See also* STANDARDS FOR FAMILY MEDIATORS, *supra* note 113, at 457 (mediator should be impartial but *not* neutral).

130. J. FOLBERG & A. TAYLOR, *supra* note 72, at 150.

131. Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 U.C.L.A. L. REV. 754, 809 (1984). *See also id.* at 801-13.

the mediator.[132] If proposals are made for the parents to consider, however, it must be emphasized, they are, "to be given no independant weight or credence," for parents retain the ultimate responsibility for decision-making.[133]

Generally the mediator's tactics are directed toward inducing parents to a "shift in consciousness about the nature of conflict resolution" away from "adversarial thinking"—toward a change in parental "attitudes, beliefs, feelings, and behavior."[134] Whereas the adversary system inhibits cooperation and communication between parents, the mediator encourages the parents to develop "new patterns of relating to each other which are appropriate for their continuing roles as co-parents."[135] Perhaps all the parents require, after having emerged from adversarial combat is "both permission and opportunity to communicate, and to learn new things about each other" for them to begin to unilaterally solve their problems.[136] The mediator's presence, alone, listening to them,[137] may put them on their good behavior for this process.[138] However, parents during mediation may require more direction, and an adjustment of focus from past events towards present interests, particularly those of the children.[139] The mediator by "management of the interchange" demonstrates to the family "that it is possible to discuss divisive issues without rancor or evasion,"[140] and by developing a bond of trust between him or herself and the parents, gradually recreates trust between the parents themselves.[141] Although there are those who contend, echoing the critics of joint custody, that the process is only suitable for parents predisposed to cooperation,[142] others disagree and argue that mediation may be most beneficial to those "in strong dispute."[143] Thus, a mediator

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132. R. SALEM, *supra* note 70, at 56-57; STANDARDS FOR LAWYER MEDIATORS, *supra* note 96, at Standard I, spec. consid. c.

133. STANDARDS FOR LAWYER MEDIATORS, *supra* note 96, at Standard I, spec. consid. c.

134. D. SAPOSNEK, *supra* note 32, at 22. *See* Steinman, Zemmelman & Knoblauch, *supra* note 7, at 558.

135. *Non-Judicial Resolution*, *supra* note 51, at 594 (footnotes omitted). *See* D. SAPOSNEK, *supra* note 32, at 21 ("[M]ediation...rests on the principle of cooperative sharing.").

136. Scheiner, Musetto & Cordier, *supra* note 19, at 103.

137. *See* R. SALEM, *supra* note 70, at 52-55, 59.

138. Fuller, *supra* note 80, at 309.

139. *See id.*; D. SAPOSNEK, *supra* note 32, at 70.

140. Fuller, *supra* note 80, at 309.

141. R. SALEM, *supra* note 70, at 58-59. "The mediator's job is to transfer the trust to the parties and hope you leave them with trust in each other." *Id.*, *quoting* Thomas R. Colosi, Vice Pres. of Am. Arb. Assoc.

142. Riskin, *supra* note 77, at 33; Dullea, *supra* note 72, at 15 ("Most professionals say the process will not work for hostile couples."). For inferential clinical support of this proposition, *see generally* Steinman, Zemmelman & Knoblauch, *supra* note 7.

143. Dullea, *supra* note 71, at C12. "Those who have worked out the emotional issues don't get out of hand in an adversarial setting." *Id.*, *quoting* J. Haynes, family mediator

may employ his or her talents to develop cooperative consciousness between even joint custodians who have had, by court order or some manner of coercion, the structure imposed on them.[144]

Striving to achieve cooperation between antagonistic parents is only one aspect of the mediator's dual purpose in family mediation. The mediator must also be an "advocate for the children."[145] Although not always expressed in terms of "advocacy," mediation literature repeatedly emphasizes that the mediator's function is to promote the children's best interests.[146] Usually, this means "that children be left with two functioning parents and a method of intimate communication with them."[147] Custody mediation is distinguished from "most other kinds of mediation, because divorce is not just a two party dispute . . .; there exists an interested and often powerless third-party, the child, whose interests must be presented and upheld."[148] The mediator may remain impartial as between the parents, but cannot remain neutral as to the path mediation follows:[149]

> The mediator ... has a duty to assist parents to examine the separate and individual needs of their children and to consider those needs apart from their own desires for any particular formula. If the mediator believes that any proposed agreement between the parents does not protect the best interest of the children, the mediator has a duty to inform them of this belief and its basis.[150]

One of the central purposes of mediation of parental conflict should be "to minimize the adverse impact which the situation will have on the children."[151] Concentrating parental attention on the children's best

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and author. *See* Pearson & Theonnes, *supra* note 71, at 516 ("We find that many couples who have extremely strained relationships, complex disputes, and severe financial pressures are able to produce agreements in mediation.").

144. *See* D. SAPOSNEK, *supra* note 32, at 21 ("Whether joint custody is imposed or mutually agreed upon...[m]ediation is the ideal format for...negotiations.").

145. *See* D. SAPOSNEK, *supra* note 32, at 37.

146. *See* Spencer & Zammit, *supra* note 24, at 911; Scheiner, Musetto & Cordier, *supra* note 19, at 103; STANDARDS FOR FAMILY MEDIATORS, *supra* note 112, at 457; STANDARDS FOR LAWYER MEDIATORS, *supra* note 96, at Standard III, spec. consid. D; Coombs, *supra* note 69, at 482; Hopkins, *supra* note 106, at 63.

147. J. FOLBERG & A. TAYLOR, *supra* note 72, at 179 (summarizing the message of literature "about children of divorce and custody mediation.").

148. Hopkins, *supra* note 106, at 63 (emphasis omitted).

149. *See id.*; STANDARDS FOR FAMILY MEDIATORS, *supra* note 112, at 457 ("Impartiality is not the same as neutrality"); D. SAPOSNEK, *supra* note 32, at 178-79; R. SALEM, *supra* note 70, at 61-62.

150. STANDARDS FOR FAMILY MEDIATORS, *supra* note 112, at 457. *See* STANDARDS FOR LAWYER MEDIATORS, *supra* note 96, at Standard III, spec. consid. D.

151. Spencer & Zammit, *supra* note 24, at 911.

Consider: Scott & Derdeyn, *supra* note 12, at 493. "There are indications that even when parents are committed to and happy with joint custody, some children may have difficulties with the arrangement. This may result either from confusion and anxiety associated with living in two homes, or because of loyalty conflicts and a concern with

interests during mediation, however, "does not represent an attempt to impose an external paternalistic force; rather, it reflects the assumption that parents will want to reach a decision which will promote the child's welfare."[152]

Although development of parental cooperation during mediation may lead to better adjustment in children,[153] often the mediator must play a more persuasive role as an advocate, continually pressing upon parents their responsibilities to the children[154] and reiterating their children's rights "to a good relationship with both parents . . . support [from] both parents."[155] Some mediators suggest that the children become actual parties to the mediation,[156] although the question of the extent of involvement of children in the process remains generally unsettled in the mediation community.[157] The mediator's expression and actions throughout mediation which indicate concern for the children's welfare and for their involvement in the process, "usually engenders a reciprocal response in the parents, who appear to become more flexible and reasonable both in terms of their personal interaction and in their

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fairness toward both parents." *Id.* Zimmerman, *supra* note 28, at 26 (quoting Judith S. Wallerstein, author and psychologist), ("We're asking children to be more flexible than many adults could be.").

152. Spencer & Zammit, *supra* note 24, at 932-33.

153. Axelrod, Everett & Haralambie, *supra* note 50, at 43. "To the extent that mediation leads to a greater parental adjustment, reduces levels of parental conflict, and increases time that parents can devote to their children, children become better adjusted." *Id., quoting* Pearson, *Child Custody: Why not Let the Parents Decide*, 20 JUDGES J. 6 (1981). *See also* J. FOLBERG & A. TAYLOR, *supra* note 72, at 180; Steinman, *supra* note 7, at 413; Clawar, *supra* note 6, at 28 ("[T]he child who manifested regressive behavior during the custodial conflict improved radically when he learned that his parents were involved in custody counseling.").

154. Coombs, *supra* note 69, at 481-82.

155. Davidson & Gerlach, *supra* note 37, at 261 (footnotes omitted).

156. Coombs, *supra* note 69, at 480.

Involvement of the children may be necessary in some situations as the children may be " *innocent but functional contributor[s]* to conflict between the parents," D. SAPOSNEK, *supra* note 32, at 120, by their reunification strategies, manifestations of separation anxiety, testing of parental love, attempts at fairness between the parents, and attempts to protect their own and parental self-esteem. *Id.* at 123-32. *See also* Steinman, *supra* note 7, at 409.

157. *See* J. FOLBERG & A. TAYLOR, *supra* note 72, at 179.

One author suggests "that the mediator who contemplates involving the children in an ongoing...process clarify several issues for himself prior to involving the children." These include: (1) the likelihood of success; (2) parental willingness to include the children or the potential for further polarization by their presence; (3) parental ability to control their behavior in front of the children; (4) parental deference to children's desires; and (5) where the mediation will take place. Phear, *Involving Children Within the Divorce Mediation Process*, in ALTERNATIVE MEANS OF FAMILY DISPUTE RESOLUTION 205, 207 (H. Davidson, L. Ray & R. Horowitz, eds. 1982).

Advantages and methods of bringing children into the mediation process are discussed in Coombs, *supra* note 69, at 479-81; D. SAPOSNEK, *supra* note 32, at 83-90, 189; J. FOLBERG & A. TAYLOR, *supra* note 72, at 180-83.

decisionmaking."[158] Therefore, as with joint custody where mutual access to and control of the children may mollify parental tension and acrimony, the mediation process comes full circle here with the children's participation, in fact or in spirit, as a positive influence upon the parents' cooperative attitudes.

The close correspondence between the priorities of joint custody and mediation, each encouraging parental cooperation and communication on child-rearing issues, urges a marriage of the mediation process to joint custody arrangements. A union of the two devices cannot help but have a salutary effect on the future relationships of all members of the family. The majority of parents who participate in mediation tend to be greatly satisfied with the process and perceive it as fair or just.[159] Only a small percentage of those who have been exposed to mediation turn to courts for resolution of custody diputes, with the majority of parents forging an agreement either during or after mediation.[160] Confidence develops among those who have been successful in mediation that future problems will not require resort to the courts.[161] Mediated agreements, as a result, may be "more durable than those worked out by attorneys or imposed by judges,"[162] with greater compliance and better adjustment by parents.[163] Mediation may, in fact, provide parents "with the first successful experience they have had since the failure of their marriage. In this they are affirmed as being competent parents who are in charge of their own destiny, able to reach decisions, and negotiate successfully in an extremely difficult area."[164] Even if parents determine during or after mediation that the joint custody relationship is no longer viable, a precedent for dialogue and cooperation has been

158. Phear, *supra* note 157, at 213.

159. Pearson & Theonnes, *supra* note 71, at 514-15.

The Pearson & Theonnes study, cited throughout this paragraph, is one of the few which has examined the efficacy of mediation on custody and visitation disputes. Professor Robert J. Levy has criticized the study on several grounds, including "shortcomings in the authors empirical method" and intrusion of the authors' pro-mediation bias. *See* Levy, *supra* note 56, at 525, 528-29. He labels the study as "advocacy disguised as research." *Id.* at 533. For a response by Drs. Pearson and Theonnes, *see* Pearson & Theonnes, *Dialogue: A Reply to Professor Levy's Comment*, 17 FAM. L.Q. 535 (1984).

160. Pearson & Theonnes, *supra* note 71, at 504 ("[O]ver 80 percent of those exposed to mediation produce their own custody and visitation agreement, either during or after the process. Less than 20 percent turn to the court for a solution. However, almost half of those never exposed to mediation rely on the court for a decision.").

161. *Id.* at 505 ("[A]pproximately 70 percent of the adversarial samples and unsuccessful mediation clients expect to go back to court....").

162. *Id.* at 509.

163. *Id.* at 499, 509, 515; Axelrod, Everett & Haralambie, *supra* note 50, at 42 (citing Bahr, *An Evaluation of Court Mediation*, 2 J. FAM. ISSUES 39 (1981)).

164. Scheiner, Musetto & Cordier, *supra* note 19, at 105.

established. In whatever custody arrangement that develops, the facility of parents to cooperate and communicate will inure to the benefit of the children.

D. *Mediation: An Imperfect Solution?*

Although mediation appears to provide joint custody families with a mechanism for dispute resolution which is incredibly well suited to their unique needs, mediation should not be mistaken for a panacea for every conflict which may afflict the healthy operation of joint custody. Mediation, representing a significant step beyond judicial supervision of family dispute resolution, may create problems which might not occur in judicial dispute resolution and which may aggravate tensions between joint custodians. Abuse of the mediation process by parents or by the mediator may occur, becoming tantamount to abuse of the children. A provision in a decree requiring mediation of family disputes prior to judicial intervention may not be wise without some means to avert or remedy these potential problems.

The most salient problem accompanying joint custody mediation is the mediator's inability to compel participation by reluctant parents and to ensure their compliance with the joint custody decree or mediated agreements. Obviously, without parental participation or compliance, provision for post-divorce mediation is meaningless. In most instances, the first "agreement" between parents is a "mediation contract" which sets forth the terms, conditions, and goals of mediation.[165] The contract may include a provision requiring submission of future disputes to mediation prior to litigation, as well as provisions relating to choice of the mediator, "the need for full disclosure, confidentiality, and the need to make decisions in light of the children's best interests and needs."[166] In most joint custody arrangements, this "contract" will be found in joint custody separation agreements or orders and will be incorporated into the final custody decree. Similarly, agreements created in the course of mediation may subsequently be incorporated into the decree as amendments.[167] These later agreements set forth the solutions arrived at by the parents during the mediation process.[168]

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165. Phear, *supra* note 157, at 206; Axelrod, Everett & Haralambie, *supra* note 50, at 47.

166. Phear, *supra* note 157, at 206.

167. *See, e.g.*, OHIO REV. CODE ANN. § 3109.04 (Baldwin Supp. 1987). *See also* Spencer & Zammit, *supra* note 24, at 934. "The accomodations reached as a result of mediation should be incorporated into an amendment to the separation agreement. Future disputes will then be resolved in terms of the separation agreement as so modified." *Id.*

168. *See* D. SAPOSNEK, *supra* note 32, at 97-99.

In most mediation, refusal to participate in the process or to comply with agreed upon terms may merely raise a remote threat of a breach of contract action if damages have been incurred by the other party.[169] In joint custody mediation, however, incorporation of mediated agreements into the court decree may lead to more direct sanctions for parental noncompliance. Perhaps a contempt citation will be issued against the recalcitrant parent. Judicial impatience with parental noncooperation may also transform joint custody into sole custody. Thus the mere inclusion of a provision in a decree prescribing mediation prior to further litigation may make mediation mandatory and noncompliance an affront to the court. Enforcibility, however, remains a serious issue as the threat of contempt proceedings may not effectuate participation and compliance.

When offered free mediation services, a considerable number of disputants reject the offer outright or retreat upon initial exposure to the process.[170] Reluctance to participate in mediation may simply "reflect the fact that mediation is alien to the general public and/or that disputants feel antipathy toward the prospect of cooperating with their adversaries."[171] In divorce mediation, custody rights are yet to be determined and each parent has everything to lose and nothing to gain by stubborn refusal to cooperate in the process. However, a parent's stature as joint custodian may lull an abstaining parent into complacency regarding post-divorce informal dispute resolution. Some commentators assert that both parents' "unwillingness" to take part in mediation indicates "the dispute may be more suited to the adversary processes, such as arbitration or litigation."[172] Without voluntary, good faith submission to the process, "mediation prior to litigation is likely to be no more than a formality to be observed."[173] Yet, joint custody's primary

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169. *See* N. ROGERS & R. SALEM, *supra* note 62, at 151-79. Professor Nancy Rogers also suggests that in some circumstances mediation participation and compliance may be enforced by other devices, such as liquidated damages or penalty provisions in the original agreement. Lecture by Professor Rogers, Ohio State University College of Law, Nov. 1984. Although somewhat extreme, perhaps courts with "friendlier parent" policies, *see supra* note 125, may in the future order joint custody with a proviso that if good faith efforts are not made to resolve disputes in mediation prior to relitigation, sole custody will automatically be presumed to vest in the complying parent. Problems, however, may arise in determining "good faith" and in treating the child as an "object of reward for one parent while withheld in punishment to the other." Speca & Wehrman, *supra* note 10, at 8. *See* Trombetta, *supra* note 21, at 233.

170. *See* Pearson & Theonnes, *supra* note 71, at 502 (citing various studies which have reported high refusal and attrition rates).

171. *Id.*

172. *See also* STANDARDS FOR LAWYER MEDIATORS, *supra* note 96, Standard I, para. D. ("The mediator shall instruct the participants that either of them or the mediator has the right to suspend or terminate the process at any time."). *See supra* note 142, authorities cited therein, and accompanying text.

173. Axelrod, Everett & Haralambie, *supra* note 50, at 47.

frame of reference is the children, and their best interests will not be advanced by empty formalities in parental mediation, nor by adversarial parental posturing in litigation. To avoid this no-win situation, mandatory mediation has increasingly been advocated and instituted for resolution of custody disputes between parents.[174] Participation is compulsory prior to litigation. Court sponsored programs are often suggested,[175] as they are more visible to parents than private mediation[176] and may impress upon parents the courts' continuing interest in their children.[177] Mandatory mediation in court programs can be closely monitored and parental participation and compliance scrutinized. However, in the usual circumstance where court affiliated programs have not been instituted,[178] the mediator, even in explicitly mandatory mediation, may be unable to effect parental compliance with the mediation contract or with any subsequent agreement.

In some circumstances, though, even the mediator's brief access to joint custodians by the mediator may be sufficient to develop in them accomodative attitudes towards mediation. Mandatory mediation requires employment of different tactics by the mediator from those employed in a voluntary process.[179] Therefore, the mediator may attempt persuasion, bordering on coercion, to move parents into compliance. Greater emphasis on statutory or judicial policies favoring joint custody, the more cooperative parent, the remarried father, or the maternal environment may provide the leverage the mediator needs to elicit cooperation

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174. Many writers urge mandatory mediation for custody and visitation disputes. *See, e.g.*, Trombetta, *supra* note 21, at 232; Scott & Derdeyn, *supra* note 12, at 498.

Scott & Derdeyn, *supra* note 12, at 498 n.209, indicates that some jurisdictions "currently provide judicial authority to order litigating parties to participate in mediation," including, CAL. CIV. CODE § 4600 (West 1983); COLO. REV. STAT. § 14-10-123.5 (Supp. 1983); CONN. GEN. STAT. ANN. § 466-56a(c) (West Supp. 1983); DEL. CODE ANN. tit. 13, § 725 (1982) (mandatory); IOWA CODE ANN. § 598.41 (West Supp. 1983); 23 PA. CONS. STAT. ANN. § 1006 (Purdon Supp. 1982). *Id.*

175. *See, e.g.*, Grief, *supra* note 18, at 33 (appointment of conciliation counselors); Meyer & Schlissel, *supra* note 14, at 30, col. 2; O. COOGLER, STRUCTURED MEDIATION IN DIVORCE SETTLEMENT (1978).

176. Meyer & Schlissel, *supra* note 14, at 30, col. 2.

177. Controneo, *supra* note 20. "By guiding a family toward post-divorce counseling, the court lends its weight to the child's right to continuous accessibility to both parents in a way which does not overburden the child." *Id.*; Nestor, *Developing Cooperation Between Hostile Parents of Divorce*, 16 U.C.D. L. REV. 762, 772 (1983) ("[P]arents get a sense—partly unconscious, partly conscious—of being part of a family network.").

178. Although court connected programs are "increasingly available to help families make their own decisions about child custody," Folberg & Graham, *supra* note 2, at 536, these programs may not find favor in areas of political and economic conservatism and thus may be limited to large and liberal urban centers. *Non-Judicial Resolution, supra* note 51, at 591. Moreover, where programs exist they may concentrate exclusively on divorce mediation, that is, on the original custody dispute, rather than on assisting divorced parents fine-tune discordant relationships.

179. *See* D. SAPOSNEK, *supra* note 32, at 36.

from one or both parents. Moreover, discussion of the emotional and economic costs of litigation as well as the overall effect of sustained parental hostility on children may further encourage acquiescence to the process. Threatening forfeiture of parental rights to custody, stressing the harm which parental acrimony causes children, and examining the costly alternative to mediation "should give embattled parents food for serious thought."[180] A mediator's authority, however, is usually no greater than educative. A stubborn parent may disregard his or her admonishments and withdraw from the mandatory mediation process as though it were indeed an empty formality.

A mediator may, during mediation, encounter circumstances in joint custody families which create doubts in his or her mind as to the wisdom of continued mediation because of a pernicious joint custody arrangement. The mediator's specific duty is "to suspend or terminate mediation whenever continuation of the process would harm or prejudice one or more of the participants."[181] Presumably, a mediator would also have an implicit duty to suspend or terminate mediation whenever continuation of the underlying legal relationship of joint custody would harm one or more participants—or interested parties, such as the children—and mediation cannot alter or improve the situation. When parents enter mediation with ulterior motives, mediation, though not impossible, may be difficult to execute. For example, a mediator may discover that joint custody was sought and obtained by the parent to wreak revenge upon the ex-spouse, that is, only to harrass and abuse.[182] For other parents, mediation may be simply an irritating obstacle to speedy accomplishment of sole custody as revenge.[183] Disruption of the process to heighten the tension may be some parents' singular objective. On the other hand, a mediator may encounter participants apparently agreeable to mediation and satisfied with joint custody, but between whom there appears to be serious problems, such as physical and/or emotional abuse,[184] which may be warping the joint custody relationship. The mediator, uncertain of his or her conclusions, may be reluctant to terminate mediation, especially if retaliation by the offending spouse against the abused parent seems possible. To make matters worse, conversely, entirely unverifiable accusations of abuse committed by a parent against either

180. Robinson, *supra* note 11, at 654 n.33. *See also* D. SAPOSNEK, *supra* note 32, at 82.

181. STANDARDS FOR FAMILY MEDIATORS, *supra* note 112, at 458, Standard V.

182. D. SAPOSNEK, *supra* note 32, at 156; Gardner, *supra* note 1, at 68.

183. *See* D. SAPOSNEK, *supra* note 32, at 155.

184. For a discussion of domestic violence and mediation, *see id.* at 252-54. Joint custody has been ordered in cases involving battered women. *See* Schulman & Pitt, *supra* note 6, at 555-56; *Second Thought on Joint Custody*, *supra* note 40, at 4.

the other parent or the children may be introduced into the proceedings.[185] In other words, the mediator may find himself mediating between parents whose joint custody arrangements reflect the worst effects of preferences and presumptions in favor of joint custody or of rubberstamping joint custody separation agreements. Parents who individually or jointly exploit joint custody to further selfish ends because of incompetence, disorder, or uncontainable mutual hostility may similarly exploit mediation. Although the mediator may terminate mediation, this will not terminate the conflict nor its inevitable consequences for the children.

As the advocate of the children, the mediator has a special responsibility to uphold their best interests. If the mediator observes and cannot remedy abuse of the children by parents which does not amount to that which he or she is statutorily obligated to report but which indicates the pernicious effect of joint custody on them, what are the mediator's options? It is urged that "the mediator has a duty to suspend or terminate the process."[186] The problem, however, may not be with the particular agreement, but with the unreasonableness of the entire arrangement for the children. Surprisingly, no authorities suggest that the mediator should terminate or suspend mediation when the best interests of the children are not protected. The mediator need only "inform" the parents of "this belief and its basis."[187] The mediator may observe occasions where the quality of parenting[188] has severely diminished during joint custody, such as where "neither parent has power and control, and the children find themselves in a no-man's land exposed to their parents' crossfire and available to both as weapons."[189] One parent may consistantly be unavailable to the children and negligent in his or her care and yet be indifferent to amending the situation. Moreover, the mediator may learn of the children's fear of "one parent's unpredictability or abusiveness" or of the children's adament refusal to spend time with one parent.[190] To guide the joint custody family through such difficulties and to balance parental expectations and attitudes against the children's needs

185. The mediator may have a legal obligation to report even unverified allegations of child abuse. For guidelines to mediators in such circumstances, *see* D. SAPOSNEK, *supra* note 32, at 253-54.

186. STANDARDS FOR FAMILY MEDIATORS, *supra* note 112, at 459.

187. *Id.* at 457; STANDARDS FOR LAWYER MEDIATORS, *supra* note 96, at Standard III, spec. consid. E.

188. *See* D. SAPOSNEK, *supra* note 32, at 259-78.

189. Gardner, *supra* note 1, at 67. ("The likelihood of children developing a psychological problem in such a situation is practically 100 percent.").

190. D. SAPOSNEK, *supra* note 32, at 81. "Obviously these situations can pose a dilemma for the mediator, especially if her role is exclusive of arbitrating or making recommendations. She must guide and shape the available choices to best serve the children. As an advocate for the children, she must manuever the parents to accomodate to the needs of their children while being sensitive to the parents' own needs." *Id. See also* Miller, *supra* note 2, at 398.

may be an impossible task, just as continuing joint custody may be, in such circumstances, against the children's best interests.

When parents abuse each other and/or their children in joint custody arrangements through or in spite of the mediation process, ideally the court should be notified so that appropriate action may be taken. The court, exercising its *parens patriae* responsibilities, may wish to disassemble the joint relationship and substitute the traditional sole custody model. On the other hand, a contempt citation may be sufficient to rectify the problem and to reinvigorate not only mediation but also joint custody. Who will alert the court to the need for action? The mediator although an advocate for the children has been locked in an impartial, confidential relationship with the parents. To notify the court would not only destroy his credibility with the parents if mediation resumes after court intervention, but would cast a pall over all future mediation for the family. Nor may the mediator counsel either parent to initiate court action. This would also injure his credibility as an impartial aid to the family and, more importantly, would constitute legal advice to a participant, which is to be generally avoided in mediation practice in favor of independant legal counsel.[191]

For parents, there are disincentives for notifying the court of noncompliance by an ex-spouse. Parents may reasonably anticipate a backlash from courts which may suspect that they, the notifying parents, are the "unfriendly" parents, merely impatient or nitpicking in order to obtain exclusive custody for themselves. Fathers may fear that courts may award exclusive custody to mothers, despite their offenses, because of maternal preferences or in the interest of stability and continuity for the children where the mother has been the primary physical custodian. Mothers who alert courts to abuses may be scrutinized themselves for unusual single lifestyles and may lose custody to a remarried father. Finally, neither parent may be willing to put children through the trauma of what may develop into a full custody contest. They may be passively waiting for the abuses to end on their own.

Children may suffer most from dilatory action to remedy parental misbehavior in mediation and joint custody. Continuing acrimony between parents after divorce—in spite of a mechanism designed to ameliorate, if not avoid such conflicts—may fuel children's suspicions

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191. *See* STANDARDS FOR LAWYER MEDIATORS, *supra* note 96, Standard I, spec. consid. H, commentary ("The mediator cannot act as lawyer for either party or for them jointly and should make that clear to both parties."); STANDARDS FOR FAMILY MEDIATORS, *supra* note 112, at 458 ("The lawyer-mediator shall not direct the decision of the mediation participants based upon the lawyer-mediator's interpretation of the law as applied to the facts of the situation."). The requirement that parents obtain independant legal advice has been criticized as "adding another tier to the...process and running up the cost." *See* Coombs, *supra* note 69, at 493 (citations omitted.).

that they have caused the parental disharmony. Since joint custody and mediation are primarily directed toward protecting children's best interests, and because children have the most to lose from sustained parental battle, it would seem that the children would be the most suitable candidates to notify the courts that something has gone wrong in joint custody. Children, however, may lack the knowledge and maturity, and especially the legal status required to notify a court. Also, they do not have a spokesperson outside of the mediation process who can assert their individual needs before a court.

Unfortunately, even *within* the functioning of the mediation process children may lack an able spokesperson for their needs. Parents are usually given the option to select their own mediator, the only limitation being that he or she be "mutually acceptable"[192] and that the parental conduct in selection does "not constitute neglect."[193] Attorneys, mental health professionals,[194] social workers and clergymen,[195] all may become mediators, "anybody can become a mediator by hanging out a shingle."[196]

Incompetence or misconduct among such mediators is a critical problem for mediation.[197] Without licensing or regulation of mediators by any governmental agencies,[198] the quality of the mediation services available in the private sector may be unpredictable. Lawyer-mediators who sever completely their mediation roles from their legal roles may not be subject to disciplinary proceedings for negligence or impropriety in their mediation practice. They, as with all other mediators, may

192. Axelrod, Everett & Haralambie, *supra* note 50, at 49 (usual wording in separation contracts providing for future mediation).

193. Spencer & Zammit, *supra* note 24, at 919.

194. The attorney is deemed to be qualified to act as a mediator in family disputes primarily because of his or her understanding of the court alternative to be avoided. For example, the attorney-mediator can "identify a myriad of legal issues that must be addressed during mediation and draft an agreement which will pass muster before the parents' independant attorneys and later perhaps before the courts." Riskin, *supra* note 77, at 41. Moreover, parents "will not spend time trying to work out a settlement with options the lawyer-mediator knows the court would not accept." Coombs, *supra* note 69, at 492.

One author suggests that "good" attorneys already possess mediation skills. While dealing with clients, attorneys must learn how to manage communication, understand interpersonal relations and negotiations, and "be able to listen well and perceive the underlying emotional, psychological and value orientations that may hold the keys to resolving more quantifiable issues." Riskin, *supra* note 77, at 36.

195. "Ministers, priests, and rabbis with family counseling training are also potential mediators, particularly if they have an established relationship with the family involved." Note, *supra* note 51, at 591.

196. Dullea, *supra* note 71, at 15. "The American Bar Association's file of what it calls mediation 'horror stories' includes complaints about practitioners described as 'Christian mediators who see the process as a spiritual one' and an unemployed steelworker said to be drawing up settlements in South Carolina." *Id.*

197. M. WHEELER, *supra* note 38, at 211.

198. Dullea, *supra* note 71, at 15.

merely expose themselves to civil actions in which a fiduciary relationship with participants may be successfully argued but proximate cause between their alleged incompetence and the injury or a lack of actual damages protects them.[199] Community censure may, unfortunately, be the most severe consequence for mediator misconduct.

The potential for real harm from mediator incompetence or misconduct does exist. The most obvious example is where the mediator lacks the skills or experience to deftly manage parental hostility or does not know when to suspend or terminate the process. The mediator's uncertainty and delay may exacerbate the conflict. Some mediators may be obsessed with obtaining compromise and agreement between parents and may intentionally prolong the proceedings to coerce compliance with his or her expectations.[200] A private mediator's desire to secure "good publicity" for his or her practice by successful mediation can "cloud" his "judgment and cause him to miss signs of one party's domination over the other."[201] When mediator self-interest supercedes concern for participants' needs and desires, parents "may feel shortchanged, manipulated, or bullied by the mediator. This can cause one or both spouses to sabotage the agreement shortly after mediation ends and create resistance to future mediation for future modifications of the co-parenting plan, because of adverse feelings about the mediator and mediation."[202]

Some authorities suggest that the mediator's responsibility to the family is not circumscribed by the time slot in which mediation is scheduled nor by the duration of a particular controversy, but that he or she "must be available as an advisor as the arrangement continues."[203] Therefore, misconduct by the mediator may include inaccessibility to the family at times of crisis—for example, at 4 a.m. at a hospital when an emergency appendectomy must be performed on a child and the joint custodians are split as to consent.[204] In fact, it is where the children come into the picture where mediator incompetence or misconduct can cause the most damage. When chosen and paid by the parents and eager to obtain a mediated settlement, the mediator may easily forget

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199. Other actions against incompetent mediators are conceivable, such as breach of contract or fraud, the latter not requiring actual damages to recover in many jurisdictions, though often requiring actual malice.

200. *See* Coombs, *supra* note 69, at 492; L. KIEFER, *supra* note 72, at 45 ("The success of mediation is usually measured by whether an agreement has been reached. It is never measured by whether the agreement is fair, workable, or enforceable.").

201. Coombs, *supra* note 69, at 492.

202. D. SAPOSNEK, *supra* note 32, at 270.

203. Coombs, *supra* note 69, at 484 n.67 (quoting IRVING, DIVORCE MEDIATION, A RATIONAL ALTERNATIVE TO THE ADVERSARY SYSTEM 164 (1981)).

204. *See* Levy & Chambers, *supra* note 6, at 413. For a discussion of crises or marathon style of mediation, *see* J. FOLBERG & A. TAYLOR, *supra* note 72, at 162.

the children's best interests, even when those interests are patently adverse to those of their parents in a particular mediated agreement.[205]

E. *Potential Improvements*

Under usual circustances, mediation will amply serve the needs of all members of a disrupted joint custody family. With hostilities diminished and agreements reached between parents, the joint custody structure will be reinforced by the mediation process. Future resort to any external dispute resolution mechanism, even future mediation, may be unnecessary once cooperation and communication between parents for the sake of the children have taken root in the joint custody family. Mediation, however, like joint custody, is an imperfect instrument for resolving all conflicts which arise between parents in the post-divorce setting. Both substandard practices by mediators and troublesome participation by joint custodians can negate potentially positive results from the mediation. Solutions, however, may be offered to correct some of these problems.

Ideally, to rectify the problems of substandard mediation, licensing and regulation of family mediators should be established,[206] with severe sanctions for mediator misconduct or incompetence. Some commentators suggest that mediation should be court-affiliated to insure uniformity in the quality of service to the participants.[207] When mediation is conducted as part of the judicial network, though, political and philosophical policies of ever-shifting domestic relations judges may influence the nature and goals of the mediation practiced.[208] A family awarded joint custody by a sympathetic judge may find itself later in a court-affiliated program influenced by a newly elected judge who frowns upon joint custody. With ever-changing judges may also come ever changing mediators. The continuing nature of joint custody would seem to demand consistancy and reliability of attitude and approach on the part of the mediator, however, in addition to some familiarity by the mediator with the individual family's particular joint custody scheme. Moreover, "courthouse" mediation programs may be more intimidating to parents than private mediation and resort to their offices for dispute resolution may be perceived as a mere perfunctory step requiring the parents' prior resolve to take their dispute through the courtroom doors. Finally, "a

205. *See, e.g.*, D. SAPOSNEK, *supra* note 32, at 270 ("In the mediator's vigorous attempts to break an impasse, he or she may overlook risks to the children presented by a particular agreement.").

206. *See* M. WHEELER, *supra* note 38, at 211 ("Certification would have to be much more vigorous than current bar licensing.").

207. *See supra* notes 175-78 and accompanying text. *See also* M. WHEELER, *supra* note 38, at 209, 211.

208. Note, *supra* note 51, at 590-601.

top-heavy bureaucracy might turn a highly personal process into a mechanical one."[209] Clearly, if state regulation of mediators does not exist and the courts must be relied upon to assure quality mediation to parents, mediators, though part of the court system, must remain somewhat independent of the system and must be able to deliver sensitive and personal attention to joint custody families despite the impersonal machinery which has created them.

When mediation has been suspended or terminated by the parents, the next step will ordinarily be removal of the dispute to the courtroom. To circumvent this consequence and the resulting harm to the family, some writers urge subsequent institution of a process of arbitration to compliment unsuccessful mediation.[210] The fact that an additional, alternative means of dispute resolution must be employed does not render the prior mediation superfluous, for "the unsuccessful mediation should have narrowed and more sharply defined the issues to be resolved."[211] If the mediator is to assume the role of impartial judge, however, this dual role may inhibit parental candor during mediation and taint the mediator's proposals for settlements with a more coercive flavor. Moreover, having observed the parents' behavior and attitudes during mediation, the mediator-arbitrator may be unable to shift to an objective and disinterested perspective of the family dispute.[212] After rendering a decision, the likelihood that joint custody mediation of subsequent issues will resume with the same individual presiding is small. Restoration of impartiality, confidentiality, and trust in the mediator may be impossible.[213]

In the event of unsuccessful mediation, the mediator, in another variation of the mediation process known as "evaluative mediation,"[214] may make recommendations to the court as to proper disposition of the issues before it.[215] This practice may not only compromise the confidentiality and privacy[216] goals of the mediation, but it may increase the

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209. M. WHEELER, *supra* note 38, at 211.

210. *See* Coombs, *supra* note 69, at 476; Spencer & Zammit, *supra* note 24, at 934.

211. Spencer & Zammit, *supra* note 24, at 934.

212. Sander, *supra* note 75, at 122.

213. Joint custody mediation unlike divorce mediation is not a single event or perhaps single issue mediation. To require parents to seek out a different mediator-arbitrator for each dispute would be in practical terms absurd.

214. *See generally* Hopkins, *supra* note 106. (This article may be the source of the term "evaluative mediation.").

215. *See* Scheiner, Musetto & Cordier, *supra* note 19, at 104. Some mediators may request permission to function exclusively as mediators and to have appointed separate "evaluators." *See* D. SAPOSNEK, *supra* note 32, at 255.

216. *See* Axelrod, Everett & Haralambie, *supra* note 50, at 48 ("[W]here the mediation is court-ordered and the mediator is required to submit recommendations if no agreement is reached, the parties have a due process right to call the mediator to testify and be cross-examined, unless the parties waive that right." (citation omitted)).

efficiency and efficacy of subsequent court proceedings to determine what is in the children's best interests. The evaluative mediator often serves a function analogous to that of a guardian ad litem for the children.[217] Evaluative mediation, however, as with mediation-arbitration, may be no more than a one time, one dispute affair, as parents may be reluctant to resume mediation conducted by a mediator who has made recomendations against what one or both of the parents perceive to be their family's best interests. Likewise, the mediation process itself may suffer from control of a mediator who may use the parents' words and actions against them at a later time.

Evaluative mediation, however, as applied in a post-divorce context, may come the closest to an ideal method of handling joint custody disputes, especially when such mediation is affiliated with the courts to supervise its quality. After all, where mediation fails to remedy the disputes of joint custodians, the future of joint custody, itself, may be open to doubt. The judge in reviewing a joint custody dispute may prematurely dismiss joint custody as unworkable and impose the traditional sole custody structure upon the family, when such a drastic measure may not be necessary, nor in the children's best interests. An evaluative mediator may check a court's hasty actions. A more circumspect and punctilious judge, on the other hand, to ascertain whether a considerable change of circumstances has occurred for the joint custody family, may assign social workers, guardians ad litem, or other court employees to explore the scope and ramifications of the dispute. An evaluative mediator may be able to provide more valuable insight and information to the court than provided by expensive strangers to the family and the dispute. An evaluative mediator may be an invaluable asset to a court in determining the continued viability of joint custody and the adjustment of the participants, especially that of the children, to the arrangement.

Some commentators declare that neither courts nor mediators associated with the family should wait for failure of a dispute resolution process to occur before evaluation of the joint custody arrangement is performed. Periodic review by mediators associated with the court can provide "a safety valve" and "valuable support for the parents and children as well as a tool for assessing the viability of an arrangement having less than ideal circumstances."[218] This "follow-up" could be arranged at reasonable intervals throughout the life of the joint custody arrangement; upon the occurrence of certain anticipated contingencies, such as remarriage, relocation, or schedule changes of one or both joint

217. Hopkins, *supra* note 106, at 64.

218. Steinman, *supra* note 6, at 760. *See also* Scheiner, Musetto & Cordier, *supra* note 19, at 104.

custodians;[219] or simply at the end of trial periods for some of the arrangements.[220] Some mediators include in each agreement a provision for a later follow-up mediation to reevaluate the particular agreement's continued viability.[221] Parental expectations that after a period of time "they will return to mediation rather than to court may well set a context for the parents to take responsibility for resolving future problems on their own."[222] Courts and mediators should not presume that "if parents do not come back to court [or mediation], the arrangement must be working well. This may be an unfounded assumption, particularly with regard to the children."[223] The mediator with responsibility to the family members and to the court, can "monitor how a particular arrangement is working and ... support parents and children in joint custody."[224]

Evaluative mediators are perhaps in the best position to discover whether joint custody has been operating in the children's best interests. Some connection with the court may be essential. Not only would a connection insure the quality of the services, but a court's influence might guarantee the mediator's focus on the best interests of the children. Parents may deem a court employee impartial and objective even after a recommendation which displeases them.[225] Moreover, courts may give such mediators' evaluations more weight because of their affiliation. If the mediator is additionally empowered with a monitoring function to notify a court when circumstances of the joint custody family severely threaten the best interests of the children or the welfare of one or both of the parents, and, thereby, the future viability of the joint custody, then the mediator would be a powerful agent of the family's future and a true advocate of the children. Courts with such personnel on hand

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219. *See, e.g.*, Gaddis, *supra* note 150, at 21.

220. *See* Scheiner, Musetto & Cordier, *supra* note 19, at 104. *See also* Gardner, *supra* note 1, at 66. Some states require that trial periods be incorporated into every joint custody decree. In Ohio, for example, every joint custody decree is "provisional" for ninety days and may be terminated upon motion of either parent, or of the court, within such period. *See* OHIO REV. CODE ANN. § 3109.04 (Baldwin Supp. 1986).

221. D. SAPOSNEK, *supra* note 32, at 113 ("[T]he mediation agreement should not be viewed as a final decree. Hence, provisions must be made for future modifications of the agreement should any of its clauses not prove tenable for any reason.").

222. *Id.* at 114.

223. Steinman, *supra* note 6, at 760.

224. *Id.* The author, Susan Steinman, a leading advocate for joint custody and herself a mediator, suggests referral to a mediator "outside of the court process." Actually her wording is ambiguous for the phrase may modify "counseling service" also, indicating that referral to counseling services outside the court system is desirable while mediation need not be independent. A mediator not associated with the courts, it would seem, would be of little utility in *monitoring* joint custody.

225. Axelrod, Everett & Haralambie, *supra* note 50, at 48. ("However, parties who utilize court-sponsored mediation typically do not have the ability to choose a compatible mediator, as they would in the private sector because the range of choice is limited.").

may be less reluctant to initially award or later retain joint custody for the family after acrimonious parental litigation. An alarm system within earshot of the court has been established.

Fortunately, courts need not create elaborate specialized programs to provide evaluative and monitoring mediation services for joint custody arrangements. Most jurisdictions already have such mediators available or have the resources to readily provide them. Guardians ad litem may most ably serve the dual function of mediators and monitors for joint custody families. Within the mediation process, or in subsequent litigation, there may be no better spokesperson for or protector of the children's best interests than the guardian ad litem. If mediation applied in conjunction with the joint custody framework represents a liberating full step away from traditional dispute resolution systems which threaten parental autonomy and the children's best interests, employment of the guardian ad litem in this new capacity represents a necessary half step back into those systems necessary to check the quality of mediation, of co-parenting, and of joint custody.

III. GUARDIANS AD LITEM AS MEDIATORS AND MONITORS OF JOINT CUSTODY FAMILIES: THE ULTIMATE SOLUTION TO THE PROBLEMS

Guardians ad litem traditionally have served as special guardians to legally incompetent parties to litigation. Unlike general guardians, their limited powers and authority have been restricted to prosecution and defense of their wards' actions.[226] Although children are not deemed formal parties in their parents' battles for their care and control, guardians ad litem have gradually been used to represent the childrens' independent interests in custody and visitation disputes.[227] In this context,

226. *See* BLACK'S LAW DICTIONARY 635 (5th ed. 1979); Comment, *Protecting the Interests of Children in Custody Proceedings: A Perspective on Twenty Years of Theory Practice in the Appointment of Guardians Ad Litem*, 12 CREIGHTON L. REV. 234 (1978).

Although required by statute in some states, guardians ad litem need not be attorneys. *See* Long, *When the Client Is a Child: Dilemmas in the Lawyer's Role*, 21 J. FAM. L. 607, 611 n.9 (1982-1983). However, many courts without statutory directive reside their trust in attorneys almost exclusively to perform this important role. Judge Henry T. Webber, Domestic Relations and Juvenile Divisions, Court of Common Pleas, Lorain County, Ohio prefers that attorneys assume the guardian ad litem function because "attorneys know the system...are screened to a certain degree before they enter the system, and enjoy a reputation of demonstrated ability of working in these troubled situations." Conversation with Judge Henry T. Webber, Domestic Relations and Juvenile Divisions, Court of Common Pleas, Lorain County, Ohio (Dec. 30, 1987). For the purposes of this article, it shall be assumed that the guardians ad litem discussed are attorneys.

227. Comment, *supra* note 226, at 234. There is growing support among family law commentators to upgrade children's status in custody litigation to that of an essential

guardians' powers may vary from neutral factfinders to child advocates. However, their focus remains constant. Guardians ad litem ensure that the children's rights and best interests are not misread, minimized, or neglected by parents or courts.[228] "Either at [their] discretion or pursuant to statutory mandate,"[229] courts—representing the state as party to the divorce action—exercise their *parens patriae* authority to protect children who are unable to protect themselves by appointing guardians ad litem.[230]

A. *The Need for Guardians Ad Litem in Custody Disputes*

The rationale behind application of the guardian ad litem device to custody proceedings tracks that which underlies the development of joint custody and custody mediation. The courts are unsuitable forums for determination and protection of the best interests of children. First, the imprecise "best interests" standard itself argues for enlistment of guardians ad litem to assist courts in analyzing its proper application in a particular case. The controlling test, "the best interests of the children," demands of courts "an ability to foresee the development of the relationships between" children and parents and "to make determinations absent specific guidelines regarding which social forms, conventions, and behavior produce the most well-adjusted and socially productive persons."[231] The guardian ad litem, though no guarantor of

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party. *See, e.g.*, J. GOLDSTEIN, A. FREUD & A. SOLNIT, BEFORE THE BEST INTERESTS OF THE CHILD 65 (1979). Speca & Wehrman, *supra* note 10, at 23-25, 37 (rights of children to intervene in divorce action); Felner, Farber & Kent, *supra* note 4, at 307; D. SAPOSNEK, *supra* note 32, at 67. One writer argues, however, that the "child is not a party but rather is the individual whose interests—once determined—must by law prevail." Note, *supra* note 14, at 1155.

228. The guardian ad litem acts as "a persistent reminder that the child is not merely an object to be awarded to the more deserving parent." Note, *supra* note 14, at 1137.

229. Comment, *supra* note 226, at 235, 248. The inherent power of the courts to appoint guardians ad litem for children in custody cases is explained in Levin, *supra* note 40, at 364, and Speca & Wehrman, *supra* note 10, at 29 ("[S]imply another manifestation of the power of equity to protect the interests of the child."). *See also* Barth v. Barth, 12 Ohio Misc. 141, 225 N.E.2d 866 (Stark C.P. 1967).

Some commentators argue that in every divorce action "only the mandatory appointment of guardians ad litem can adequately safeguard the interests of the child." Comment, *supra* note 226, at 254. *See* Casasanto, *supra* note 40, at 58; Levin, *supra* note 40, at 349, 364. Constitutional due process should demand it. *See* Speca, *Representation for Children in Custody Disputes: Its Time has Come*, 48(3) U.M.K.C. L. REV. 328, 333-34 (1980). In Wisconsin, guardians are appointed in every case where custody is contested. *See* Wendland v. Wendland, 29 Wis. 2d 145, 156, 138 N.W.2d 185, 191 (1965). But no state requires appointment in every case of divorce. Ardagh, *California Civil Code Section 4606: Separate Representation for Children in Dissolution Custody Proceedings*, 14 U.S.F. L. REV. 571, 577 (1980).

230. Speca & Wehrman, *supra* note 10, at 15. Formerly, the *parens patriae* doctrine was invoked to justify denial of independent representation for children on the grounds that the court could ably serve and protect the children's best interests. Although this attitude still remains popular, the trend is away from it. *See* Comment, *supra* note 226, at 240.

better application of the test,[232] may provide additional information and insight on the children's best interests to guide a court toward proper decision-making. Secondly, the "gradual end of absolute rights of parents"[233] and recognition of children's rights[234] "to be treated as ... interested and affected person[s] and not ... as pawn[s], possession[s], or chattel[s] of either or both parents"[235] have contributed to increasing adoption of guardians ad litem in custody cases. Children have "the right to be heard and listened to," and the right to "have standing in legal proceedings to assert [their] claims of interest"[236]—"the conceptual right to be represented by a guardian ad litem."[237] Finally, supporters of the guardian ad litem mechanism join advocates for custody mediation and joint custody in lamenting the unsuitablity of the adversary format when a child's custody is disputed.[238] Unlike their fellow innovators, however, proponents of the guardian ad litem mechanism have reconciled themselves to the fact that the adversary system remains firmly entrenched in our legal system in cases involving children.[239] The use of guardians ad litem in custody cases is intended to mollify the tenor of the proceedings from accusatorial, as between parents, to inquisitorial, as between the court and the children's needs, desires, and best interests.

Neither courts nor parents are always capable of providing necessary protection to children's rights and interests within adversarial contests. Traditionally, judges have been assigned the role as the children's spokespersons responsible for their protection from adversary proceedings. However, with practical limitations on their time and quality of contact with the children, judges may not always adequately perform this function.[240] The various investigative or social agency experts enlisted

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231. Mlyniec, *The Child Advocate in Private Custody Disputes: A Role in Search of a Standard*, 16(1) J. FAM. L. 1, 12 (1977-1978).

232. *See generally id.* at 4, 11-13.

233. *Id.* at 5.

234. *Id.* at 2, 5; Note, *supra* note 51, at 587. *See also infra* notes 235-36 and authorities cited therein.

235. Hansen, *The Role and Rights of Children in Divorce Actions*, 6 J. FAM. L. 1, 5 (1966). *See also* Speca & Wehrman, *supra* note 10, at 7.

236. Foster & Freed, *A Bill of Rights for Children*, 6 FAM. L.Q. 343, 355 [hereinafter *A Bill of Rights*]. The authors of this article are also leading proponents for joint custody. *See generally A Viable Alternative*, *supra* note 6; Foster & Freed, *supra* note 17. Professor Foster is an advocate for mandatory appointment of counsel for the children in every instance of a "marital breakdown" (*see* Levin, *supra* note 40, at 365; Letter to Levin, (Oct. 2, 1973)), a fact implied but not explicit in *A Bill of Rights*, *supra* at 353-56.

237. Levin, *supra* note 40, at 357 (emphasis omitted).

238. *Id.* at 349; Note, *supra* note 12, at 1135; Comment, *supra* note 226, at 240; Barth v. Barth, 12 Ohio Misc. 141, 224 N.E.2d 866, 867 (Stark C.P. 1967) ("A child by definition, is inherently unequal in a contest based upon a system of law...the adversary process...that contemplates a contest of reasonably equal parties.").

239. *A Bill of Rights*, *supra* note 236, at 356. *See* Levin, *supra* note 40, at 349.

by courts and parents to augment the judicial role may likewise, lacking sufficient intimacy with the children and their parents' controversy, fail to improve the children's circumstances in court.[241] Furthermore, courts by trying to simultaneously supervise the proceedings and speak for the children's best interests are forced "to assume two conflicting roles—advocate and arbiter—to the ultimate detriment of both."[242]

Usually, evidence to decide custody is presented to a court by the parents through their lawyers. Although in other circumstances parents may be regarded as reliable spokespersons for their children, in the custody arena, "neither parent can be presumed to be the exclusive representative of the child ... and [n]either parent can be relied on to communicate to the court the child's interests that differ from those of one or both parents."[243] Indeed, the children's interests may be substantially incompatible with or adverse to those of either or both parents in a custody action.[244] Evidence presented in such cases, where relative

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240. Note, *supra* note 14, at 1136 ("[J]udge is restricted to the courtroom and cannot on his own obtain the facts pertaining particularly to the child's viewpoint."); Levin, *supra* note 40, at 347 ("[J]udge is not trained in the behavioral or social sciences"), at 348 ("A relatively brief, one-time communication between a judge and a small child is inherently limited in its effectiveness."); Meyer & Schlissel, *supra* note 14, at 30, col. 2 ("No matter how conscientious the trial judge, he has neither the time nor the means to investigate the underlying circumstances that an independent representative of the child would have.").

One Ohio judge has pointed out the special problems some domestic relations courts have in Ohio in ascertaining the best interests of the children. "In divorce proceedings it is harder to generate information because there is not enough control over the proceedings as there is in juvenile cases.... The juvenile court has a great deal of authority to investigate and more personnel. If there is no [separate] domestic relations court," the court which hears divorces "is the step-child of the general division. If a domestic relations division exists, there is not the necessary personnel because of lack of interest or funding." Furthermore, other issues for decision may distract the resources and attention of the court in divorce proceedings, such as pertain to alimony and property division and marital fault. Conversation with the Honorable Henry T. Webber, Domestic Relations and Juvenile Divisions, Court of Common Pleas, Lorain County, Ohio (Dec. 30, 1987).

241. First, note that guardians ad litem provide "a different perspective and set of skills" than investigative agency and social agency personnel. Note, *supra* note 14, at 1177. Repeatedly, it has been pointed out by the commentators, the experts employed by a court to facilitate its fact-finding do not succeed in fulfilling their responsibilities. *See id.* at 1178 (reports inaccurate and incomplete), at 1179 ("Family Relations information on the child...found to be misleading and superficial"), at 1180 (parents "shopping" for experts); Mlyniec, *supra* note 231, at 2 ("[E]xperts have failed in their roles"); Casasanto, *supra* note 40, at 37 n.10 ("[P]robation study...cannot...substitute for the child's independent representation").

242. Ardagh, *supra* note 229, at 573. The problem of conflicting roles of advocate and arbiter for judges may also affect mediator-arbitrators.

243. Note, *supra* note 14, at 1134.

244. *See id.* at 1138; D. SAPOSNEK, *supra* note 32, at 67; Comment, *supra* note 226, at 241; Barth v. Barth, 12 Ohio Misc. 141, 335 N.E.2d 866, 867 (Stark C.P. 1967) ("[I]t is well recognized by this court, and given legislative recognition in some states (for example Wisconsin), that in some divorce cases, the interests of the minor children are, or may be, substantially different from either or both of the parents. In such cases, the child may well receive inadequate protection in the adversary system of divorce."); Speca,

parental fitness is weighed by inscrutable standards, may be "colored by the biases of the parents whose primary concern is to discredit the other in the eyes of the court."[245] The degeneration of parent-child relationships, which occurs frequently during and after divorce litigation,[246] argues further against parental representation of their children's interests during a major family crisis. Parents may simply be out of touch with their children's needs or desires. Attorneys for the parents must represent their clients' interests exclusively,[247] even if they have "personal reservations about the qualifications of [a] client as a custodial parent."[248] If the attorneys for the parents are deemed to represent the children in addition to their adult clients, they may wrestle with many ethical problems. These include obtaining consent to dual representation from the children by meaningful disclosure of the potential for conflicts of interest,[249] and avoiding influence from the paying parents over their professional judgments.[250] When actual conflicts arise, the attorneys must confront another dilemma, namely, the necessity of withdrawal from one or both clients' representation.[251] Neither parents nor children can benefit from advocacy by an attorney caught in such binds. In many circumstances, separate representation for the children may be the only solution.

Parents, their attorneys, and the courts cannot, in most custody cases, sufficiently protect the children's interests. In joint custody disputes, the presence of these deficiences may be more prevalent. The necessity

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supra note 229, at 337 ("[T]hat the interests of the child and the interests of both of the parents are identical...[is] an absurd supposition on its face, since the interests of the parents conflict....").

245. Casasanto, *supra* note 40, at 37. *See* Levin, *supra* note 40, at 350. *See also* Ford v. Ford, 371 U.S. 187, 193 (1962).

246. *See* J. WALLERSTEIN & J. KELLY, *supra* note 21, at 109 ("[T]wo-thirds of mother-child relationships"), at 117 ("[D]ecreased physical and emotional availability."). During joint custody relitigation if joint child care continues, one can imagine either improvement or deterioration of this situation. Shuttling between homes can provide a "protective buffering mechanism" so that *together* the parents provide adequate care for the children. *See* Clingenpeel & Repucci, *supra* note 19, at 109. On the other hand, the children in such instance may suffer greater harm from having joint custodial parents. Frequent contact with both angry parents may intensify children's sense of guilt.

247. *See* D. SAPOSNEK, *supra* note 32, at 273 ("Even when lawyers are functioning in their least adversarial way, they are bound by professional ethics to represent their client, and only their client, to the best of their abilities."). *See also, e.g.*, MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 5-1, DR 7-101 (1980).

248. Ardagh, *supra* note 229, at 573 n.7. *See* Levin, *supra* note 40, at 342.

249. *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-101(A), DR 5-105(A), (C) (1980). *See also* Genden, *Separate Legal Representation for Children: Protecting the Rights and Interests of Minors in Judicial Proceedings*, 11 HARV. C.R.-C.L. L. REV. 565, 587 (1976). *But cf.* J. GOLDSTEIN, A. FREUD & A. SOLNIT, *supra* note 227, at 114 (no conflict because lawyer represents "the *family's* interests"). Note that "situational" representation has been criticized. *See* Crouch, *Divorce Mediation and Legal Ethics*, 16 FAM. L.Q. 219, 228 (1982).

250. *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-107(B) (1980).

251. Genden, *supra* note 249, at 587.

of continued quality contact between children and both their divorced parents is virtually unchallenged among mental health professionals and is developing as a fundamental legal precept in many jurisdictions. When joint custodians elect further litigation over cooperation, especially after proceeding through mediation, they endanger the future viability of joint custody, the arrangement arguably most conducive for perpetuating this context. The children's best interests in many circumstances may be in maintaining, at minimum, the integrity of the conceptual foundations of joint custody, that is, retaining joint legal custody after litigation. One or both of the parents may, prior to or during litigation, demand nothing less than exclusive custody, not yielding even minimal visitation rights to his or her adversary. To imagine a scenerio where parental and children's interests could be more incompatible or adverse would be difficult. Should even one parent align him or herself with the children to argue for retention of joint custody, doubts may be raised as to that parent's motivations. Possibly, strategies to reunite, revenge, or conceal are being executed. Joint custody, in fact, may not be in the children's best interests.

To avoid depriving children of a workable arrangement which has been only temporarily disrupted by parental self-interest, or to avoid the maintenence of a malignant system which may return to haunt the court, a court must marshal all of its powers to closely scrutinize the joint custody dispute. An independent advocate for the children or a powerful factfinder representing to the court the children's orientation in the dispute would be an invaluable tool to facilitate exploration of the depth and reach of the controversy. These forms of representation, of course, would be a tremendous benefit to decision-making in any custody action. However, "the need for such representation will be even greater when the custodial agreement is for joint custody, for by its very nature ... joint-custody ... requires even deeper, more incisive insight on the part of the trial judge than does ... sole custody."[252]

B. *Factfinder or Advocate*

Already existing within the machinery of the adversary system is an instrument to serve the children's best interests and the court's decision-making needs in such representative capacity. Guardians ad litem, depending upon their "historical usage, the type of litigation, and which trial court is involved,"[253] may function as either factfinders or child

252. Meyer & Schlissel, *supra* note 14, at 30, cols. 2-3. *But cf.* Mayer v. Mayer, 150 N.J. Super. 556, 376 A.2d 214, 218 (N.J. Ch. 1977) (contested joint custody case where court denied use of separate counsel for the children).

253. Chambers, *The Ambiguous Role of the Lawyer Representing the Minor in Domestic Relations Litigation*, 70 ILL. B.J. 510 (1982).

advocates or both.[254] Regardless of designation, their duty in custody proceedings is essentially the same—to represent the best interests of the child,[255] because "without separate legal representation, the child's interests are left to the inadequate protection of parents and the courts."[256] Either as factfinders or as advocates for the children, guardians ad litem may meaningfully contribute to the proper functioning of a court attempting to determine children's best interests.

In some jurisdictions, guardians ad litem[257] function as factfinders, that is, as investigators and advisors to the court.[258] Acting initially independently from the court, the impartial, inquisitorial factfinder[259] investigates and protects the individual desires and needs of the children in the litigation and insures "that all considerations regarding the best interests of the child[ren] will have been brought to the court's attention."[260] Though usually required to make a report to the court of the inquiry's results, he or she may[261] or may not[262] make custody recommendations to the court. The guardian ad litem factfinder may[263] or

254. Which function, factfinder or child advocate, is to be employed may depend on the status of the children in the litigation. If children are made parties, the child advocate mechanism may be employed, though this is not necessarily a condition of its use. *See* Levin, *supra* note 40, at 363.

255. Mlyniec, *supra* note 231, at 8.

256. Note, *supra* note 14, at 1133-34. *See also* Comment, *supra* note 226, at 242.

257. The term "guardian ad litem" has a "large number of meanings, including that of any legal representative for a child for the duration of a suit." Note, *supra* note 14, at 1140. Here, however, "the nonadvocate representative for the child is more properly denominated a factfinder." *Id.* at 1141.

Generally there is much confusion in the literature as to the proper designation for the particular function the so-called guardian ad litem performs. Depending upon the commentators reviewed, either or both factfinder or advocate function may be attributed to the "guardian ad litem." In some instances it is difficult to ascertain whether the writers are speaking of the factfinder or of the advocate when using the term "guardian ad litem." Usually one will observe that the term is attached to the factfinder role and the advocate role will be denominated as "child advocate," "counsel for the children," or merely as the "attorney."

258. *See* Casasanto, *supra* note 40, at 47; Long, *supra* note 226, at 617 (guardian ad litem as *amicus curiae*).

259. It is repeatedly emphasized that the factfinder must be neutral or impartial. *See* Note, *supra* note 14, at 1141; Ardagh, *supra* note 229, at 600; Genden, *supra* note 249, at 573; Speca, *supra* note 229, at 337.

260. Note, *supra* note 14, at 1141 (footnotes omitted). *See also* Levin, *supra* note 40, at 362.

261. Speca, *supra* note 229, at 331-32 ("The guardian would, at the minimum, consult with and counsel with the judge."); Ardagh, *supra* note 229, at 600 ("[M]ake a recommendation as to what type of custody arrangement would, in his or her opinion, best meet the child's best interests.").

262. Note, *supra* note 14, at 1141 (The factfinder does not "advocate a particular placement decision."). *See also* Mlyniec, *supra* note 231, at 16 (strictly limited to stating child's preference as determined by social worker.).

263. Speca, *supra* note 229, at 332 ("He would be an officer of the court and would participate in all proceedings.").

may not[264] participate in the proceedings, depending upon the court.

In other jurisdictions,[265] legal advocacy for the children is regarded as the more appropriate function for the guardians ad litem.[266] Because the custody issue is, after all, "legal to the extent that it must ultimately be heard by the court, the child needs a lawyer to manage the process of litigation"[267] and "to vigorously present the [child] client's case with the same powers as employed by the attorneys for the parents."[268] Zealous representation of the children frees "parents' lawyers to give their own clients undiluted loyalty."[269] Like the factfinder, although in a more formal manner, the child advocate bears responsibility to provide unbiased information to a court regarding the children's best interests.[270] At times, the guardian ad litem must use his or her professional judgment

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264. Note, *supra* note 14, at 1141 ("[H]e does not necessarily participate in the trial."); Ardagh, *supra* note 229, at 600 ("This kind of representation would not include...taking any active role in the hearing; the advocacy would be left to the attorneys for the parents.").

265. *See, e.g.*, Casasanto, *supra* note 40, at 47 ("Many legal scholars and at least two state courts have...conclu[ded] that advocacy is the proper role." (citations omitted.)); Note, *supra* note 14, at 1139 ("Many statutes explicitly require that the representative...be an attorney [and] urge conferral of party status on the child to clear the way for legal advocacy available to adults." (citations omitted)).

266. *See* Veazy v. Veazy, 560 P.2d 382, 390 (Alaska 1977) ("When a child needs a guardian ad litem, he needs an advocate—someone who will plead his cause as forcefully as the attorneys for each competing claimant plead theirs.").

The Honorable Henry T. Webber, Judge of the Domestic Relations and Juvenile Divisions of the Court of Common Pleas, Lorain County, Ohio, for sixteen years, requires that "the child has an advocate...to speak for the child" because "too often the child falls into the cracks of the system." In his court, the guardian ad litem is "required to participate in the trial." Judge Webber, however, recognizes the "clouded" role of guardian ad litem in different Ohio jurisdictions, recalling one panel on which he served which had three judges "who utilized guardians ad litem in three different ways." Seminar on "Guardian Ad Litem," Lorain County, Ohio (Dec. 8, 1987).

267. Note, *supra* note 14, at 1185.

268. Ardagh, *supra* note 229, at 601.

269. Note, *supra* note 14, at 1150.

270. Mlyniec, *supra* note 231, at 12; Casasanto, *supra* note 40, at 37; Chambers, *supra* note 253, at 514 ("You also serve as a 'friend of the court' in that you have the responsibility of insuring that all material evidence relating to the best interests of your client is made part of the record," *quoting in* guidelines given to guardians ad litem in Wisconsin.).

The attorney's duty to preserve the confidences and secrets of the children, *see* MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 4 (1980), severely inhibits this function. The attorney for the children may not advise or consult with the judge in some jurisdictions. *See* Holz, *The Child Advocate in Private Custody Disputes: The Wisconsin Experience*, 16 J. FAM. L. 739, 741 (1977-1978). Confidentiality restrictions, however, must be balanced against the advocates' "statutory and ethical obligations to act in the client's best interest" and at times the guardian ad litem should be permitted to share information with parents, social workers, and the court without the child-client's consent. Long, *supra* note 226, at 622 (discussion of guardian's ad litem dilemmas). By contrast, the factfinder and "child are not necessarily covered under the common law privilege of attorney-client confidentiality." Chambers, *supra* note 253, at 511.

to "independently interpret and formulate his client's interests,"[271] but "the child's desires should direct the attorney's investigation and arguments in the case."[272] In fact, guardians ad litem as advocates for the children possess the same restrictions, prerogatives and professional rights and responsibilities as do legal counsel for adults in adversary proceedings.[273] Thus, the child advocate may exercise a power never afforded to the factfinder guardian ad litem—the right to appeal a decision patently adverse to the children's best interests.[274]

Though they may be conceptually pigeonholed as either factfinders or advocates, in practice guardians ad litem may possess an "authority greater than that traditionally accorded to either" of the roles by virtue of the character of custody disputes.[275] A blending of the roles[276] may be demanded by the guardians' mandate to obtain for the children the "totality of benefits that might have been expected if it had not been for" their parents' conflict.[277] Child advocates may in practice assume child-protective functions. Factfinders, on occasion, may by necessity undertake advocacy responsibilities. Limiting guardians ad litem to "traditional or restricted role conceptions" undermines their protective purposes, for they have been appointed as representatives for the children.[278] Narrow theoretical models must yield to the practicalities of representation of children's needs during the tension of parental battles.[279]

C. *A New Role for the Guardian Ad Litem*

The combined roles of factfinder and child advocate also belong to another entity within the sphere of child custody law, the custody mediator, who employs both factfinding and advocacy skills in mediation to focus parental decision-making on the children's best interests. That

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271. J. GOLDSTEIN, A. FREUD & A. SOLNIT, *supra* note 6, at 67. *See also* Mlyniec, *supra* note 231, at 12.

272. Note, *supra* note 14, at 1146 (citation omitted).

273. Chambers, *supra* note 253, at 511; Holz, *supra* note 270, at 741; Mlyniec, *supra* note 231, at 12; Levin, *supra* note 40, at 363-64.

274. Chambers, *supra* note 253, at 511, 514; Levin, *supra* note 40, at 363.

275. Mlyniec, *supra* note 231, at 9.

276. Speca, *supra* note 229, at 332 n.23 (discussing statutory duties of guardians ad litem). *See, e.g.*, Mlyniec, *supra* note 232, at 11 n.75 (advocate as witness when children "unwilling or unable to make a choice regarding custody or when the advocate substitutes his judgment for the client's stated decision").

277. Barth v. Barth, 12 Ohio Misc. 141, 142, 225 N.E.2d 866, 867-68 (Stark C.P. 1967).

278. Note, *supra* note 14, at 1146-48, 1150, 1153 ("In sum, attorneys who labeled themselves factfinders frequently described ways in which they evaluated evidence, shaped an argument for the court, decided to curtail an investigation, and negotiated settlements. The one attorney who confined himself to investigation concluded that this failed to protect the interests of the child."). *See also id.* at 1157.

279. A discussion of the disparity between the conceptual and practical responsibilities of guardians ad litem may be found in *id.* at 1153-54.

execution of these functions is directed by the mediator to parental decision-making and by the guardian ad litem to judicial decision-making merely reflects the forum within which each *usually* operates. At times mediators may be enlisted by the courts to perform functions analogous to those of guardians ad litem, such as evaluation and recommendation to the courts of the children's best interests. Guardians ad litem also, at times, cross over into the realm of mediation practice, although usually without official directive.[280] Guardians ad litem, prior to judicial decision-making, may actually attempt to mediate between parents. Indeed, both factfinders and child advocates have been observed to provide negotiation, counseling, and mediation services for parents.[281] Commentators tend to include these functions in descriptions of essential responsibilities for guardians ad litem.[282] As will be examined below, "the child's representative in the custody suit is ideally placed to facilitate settlement."[283] Thus, between guardians ad litem and mediators, only the forum and stage of parental conflict may distinguish the guardians' and mediators' roles as representatives of the children's best interests.

Before parental conflict becomes so spirited that judicial intervention is required, parents may turn the dispute over to a mediator. The mediator will explore the familial relationships in light of the children's needs and desires and use this information to encourage and develop resolution for the dispute. If unsuccessful, the family may find itself in court, where a guardian ad litem may be appointed to repeat the process undertaken by the mediator in order to ascertain the children's best interests.[284] There is an obvious redundancy here. Use of an evaluative

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280. *See* Note, *supra* note 14, at 1154, 1173. In the study of guardians ad litem conducted and reported in *id.*, generally, only one attorney had been asked by the court to mediate. *Id.* at 1184.

281. *Id.* at 1147-48, 1150.

282. *See* L. KIEFER, *supra*, note 72, at 175 ("[T]he attorney for the children as a negotiator...may spark meaningful discussion about what the children's needs are and how best to resolve them."); Speca, *supra* note 230, at 341 ("He or she can serve as an arbitrator and conciliator between warring parents."); Casasanto, *supra* note 40, at 53-54 ("He or she could assist in negotiating a visitation schedule."); Speca & Wehrman, *supra* note 10, at 39 ("A kind of arbitrator between warring parents."); *Non-Judicial Resolution*, *supra* note 51, at 587.

283. Note, *supra* note 14, at 1155.

The author of this Note points out that "counsel for the child is well situated to fulfill the following functions of the mediator: (1) diminish conflict by facilitating reliable communication between parties; (2) reduce the stress and intensity of conflict that lead to defensive and diametrically opposed positions; (3) clarify the real issues of conflict by helping the parties identify where they agree and disagree; and (4) alter or compensate for asymmetrics in motivation or power between the conflicting parties." *Id.* at 1174-75.

284. The primary difference between the guardian ad litem's methods and those of the mediator is that the mediator may confine him or herself to the mediation sessions to uncover facts, whereas the guardian ad litem is much more likely to speak with the children separately as well as seek to interview parents informally in other surroundings to gauge their credibility. *See* Note, *supra* note 14, at 1136 n.47.

mediator in court, instead of a guardian ad litem, might avoid this problem. However, using a guardian ad litem as a mediator before litigation has been contemplated may be a better solution. The difference is not simply semantic. A guardian ad litem could bring to the mediation process benefits beyond the reach of evaluative mediators. Guardians ad litem as mediators may be the best means currently available to safeguard the best interests of children in custody disputes, especially those of children in joint custody families.

Some commentators have approached the guardian ad litem-mediator concept but have not quite arrived at its endorsement. Usually when discussing reform of child custody law, they advocate utilization of mediation programs as they simultaneously speak of employment of guardians ad litem in an ancillary role. At mediation sessions, "the representative can serve as a court watchdog to help assure that the best interests of the children are protected in such dispute resolution situations."[285] One analysis of an evaluative mediation system describes many of its functions as similar to those which a guardian ad litem would perform.[286] Joint custody commentators have embraced the application of mediation and guardians ad litem services to custody disputes, but they have never quite pieced them together in a complete, unified mechanism.[287] Employment of guardians ad litem as mediators for joint custody families, however, completes a very important puzzle: How to ensure that the best interests of the children are not neglected in mediation? Only one commentator has observed the obvious connection: "Since the guardian owes allegiance only to the children, he or she could serve as mediator for any ... disputes that may come up and possibly negate any further court action."[288]

Probably the most important benefit from the use of guardians ad litem as mediators to joint custody families is the certainty that children's best interests will be addressed during the mediation and in formulation of parental agreement. The guardian ad litem, who normally functions as an advocate, will no doubt press forward with the children's interests constantly when parents ignore them. Even the impartial factfinder will assume the advocate role easily during mediation. "Although the fact-

285. Davidson & Gerlach, *supra* note 37, at 249. *See also generally* Levin, *supra* note 40, at 366 (family court advocated with guardians ad litem to serve the family during litigation and with conciliation and counseling afterwards).

286. *See* Hopkins, *supra* note 106, at 64.

287. *See* Foster & Freed, *supra* note 17, at 24, 27; Steinman, *supra* note 6, at 760-61 (The author has juxtaposed two sections, "Follow-up" and "Input from Children," the former urging post-divorce mediation and counseling services and the latter suggesting use of "a neutral person, trained in general and divorce-specific assessment of children [to] play an important role in representing the children's separate concerns and point of view and in providing input into the decision making process.").

288. Casasanto, *supra* note 40, at 54.

finder is introduced as an impartial investigator, he is to be impartial only with regard to the parents, and even then, only initially. Entrusted with finding information pertinent to the child's interest, the factfinder ends up looking very much like the advocate."[289] In addition to their natural advocacy roles, guardians ad litem bring with them a sensitivity to children's special problems in custody disputes[290] and to their need to be heard and listened to during parental battles.[291] Other mediators who are over-anxious to achieve parental agreement may neglect these needs when the parents appear to be amenable to a suspicious settlement.[292] The guardian ad litem cannot neglect these needs. In fact, with a primary and special duty to the children, guardians ad litem may be the only mediators who will arrive at the hospital in the middle of the night to attempt crisis mediation before the judge needs to be awakened. To neglect these needs would certainly bring heavy judicial censure and disciplinary action to the attorney guardian ad litem.[293] In contrast, private attorney mediators, will not worry about risking loss of license if their mediation and legal practices are totally segregated. Non-attorney mediators need only worry about loss of referrals, and possibly, the remote chance of contempt action.

Guardians ad litem carry into joint custody dispute resolution one additional asset which militates most strongly for their adoption into this sphere of custody law. Other mediators may be powerless to compel parents' participation, to enforce compliance with a mediated agreement, or to notify a court when joint custody severely threatens the best interests of the children. However, a guardian ad litem "may ... be in a position to institute ... court proceedings on behalf of the child."[294]

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289. Note, *supra* note 14, at 1155.

290. *Id.* at 1158, 1162. (All of the interviewed guardians ad litem exhibited sensitivity to children's problems).

291. Speca, *supra* note 229, at 333 (Children "need ways freely and safely to express their thoughts and feelings...the court has a duty to require that children be provided a representative with whom they can share their internal difficulties").

292. A problem which arises in mediation which may disturb the guardian ad litem as much, if not more, than other mediators is "whether it is always better to protect children from court battles even if it means allowing them to participate in a questionable agreement." D. SAPOSNEK, *supra* note 32, at 267.

293. The guardian ad litem-mediator may provide the answer to the "true custodian" problem in joint custody where litigation is involved, i.e., the problem of which joint custodian institutes and settles legal actions for the children when parents have different perspectives on such lawsuit, and both would presumably have authority to do either without consulting the other. *See* Miller, *supra* note 2, at 393. The child advocate will prevent parents' multiple representation of their children by either mediation between the parents or actual legal representation of the children solely in his or her most traditional role.

294. Davidson & Gerlach, *supra* note 37, at 294. *See also* Levin, *supra* note 40, at 350. The guardian ad litem may also be empowered to institute abuse, neglect, dependency, or domestic violence actions on behalf of the child.

Courts who are aware of joint custody's "forced remarriage" of hostile parents may be less reluctant to permit the arrangement under the alert supervision of a guardian ad litem as "a court 'watchdog' ... to see if the parents have sold the children down the river."[295] Mediation's confidentiality is justifiably sacrificed in the case of such extraordinary circumstances to zealous loyalty to the child client's best interests. Confidentiality will be maintained in all cases where it inures to those interests. The guardian ad litem is the children's representative and should not wait until a parent or his or her attorney files the necessary court papers, if ever, when the joint custody arrangement and, subsequently, the mediation process adversely impacts upon the children.

Once in a court, the problem will probably not require separate evaluation by a social or investigative agency which might extend proceedings interminably while the children continue to suffer. The guardian ad litem, as a factfinder, may report to the court his or her findings, with or without opposition from the parents' attorneys. His or her independent action against one or both parents may injure the guardian's relationship of trust and confidence with the children,[296] but that is a small price for their expeditious protection. Criticism of guardians ad litem as causing delays and burdensome expenses to parents may be justifiably leveled at their appointment in divorce proceedings.[297] However, in this situation such criticism is misplaced. Familiarity with the joint custody family and the dispute would allow the guardian ad litem-mediator to immediately present the issue for decision before the court. Factfinding for reports or the development of arguments to the court has already been completed. Moreover, a timely contempt action instituted or brought about by the guardian ad litem may stem the tide of rising hostility between joint custodians bound for a costly and

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The guardian ad litem-mediator imposed on the joint custody family should not create a danger of more frequent court actions. As with the parents, the guardian ad litem must abide by the statement of purpose or policy of joint custody embodied in the parents' separation agreement, the court order, or the statute, i.e., it is in the best interests of the children to have continuous quality contact with both parents. Moreover, the guardian ad litem must continue to presume that both parents are equally fit for custody of their children as determined by the court in the award of joint custody, despite his or her personal opinions as to a particular parent's lifestyle, beliefs, or behavior. Only when there is a definite and objective threat to the physical or emotional welfare of the children, should the guardian ad litem-mediator be empowered to enter the courtroom on behalf of the children.

295. Foster & Freed, *supra* note 17, at 27.

296. Donald Saposnek indicates that this is a problem of all ongoing evaluative mediation. Children may feel betrayed by a mediator who, after assurances that he or she would act in their best interests, takes a position in court which deprives them of a full-time parent. Children may feel their confidences betrayed. Another danger is that the guardian ad litem may take court action after children have informed him or her of a threat which is nonexistent. *See* D. SAPOSNEK, *supra* note 32, at 15-16.

297. *See* Ardagh, *supra* note 229, at 578; Speca, *supra* note 229, at 337-38.

protracted custody war.[298] In any case, "the fact that additional time and expense may result to the litigants to ensure protection of the rights of their children is no reason for denying the protection."[299]

Fear has been expressed that the introduction of guardians ad litem into custody proceedings will intensify the adversarial character of proceedings.[300] This might similarly be a danger in mediation. An intrusive stranger[301] with excessive influence over the court[302] to represent the children's interests, although those interests may be adverse to those of their parents, would almost certainly and unnecessarily aggravate tensions.[303] However, the opposite result has been observed with the presence of guardians ad litem in dispute resolution settings. Guardians ad litem may actually pacify proceedings, either mediation or adjudication. Even if tensions are heightened by their intervention, however, guardians ad litem can skillfully redirect these tensions toward obtaining a mediated settlement between all the parties involved. That which quells parental adversity in litigation may be equally successful in mediation before the parents contemplate or need a return to court.

Guardians ad litem, by conscientiously attending to their wards' needs and desires during the family conflict, must give similar attention to the needs and desires of the wards' parents. The guardian ad litem does "not operate in a vacuum" and must not neglect the primary role of parents in deciding their children's futures. The guardian ad litem cannot pretend to have a unique grasp of the elusive application of the best interests standard.[304] Instead, he or she must strive to arrange "custodial arrangements as satisfying as possible for both parents; for in the last analysis, it is the parents who will be primarily responsible for how well

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298. This Article does not suggest that the mediator actually use this power in every case to *command* parents' participation or agreement. Such practice would counteract not only the self-determinative nature of mediation but the benefits from reduction of caseload burdens for courts. The mediator may, however, include this power in his or her arsenal to display before parents to *persuade* compliance.

299. Speca & Wehrman, *supra* note 10, at 31-32.

300. *See* J. GOLDSTEIN, A. FREUD & A. SOLNIT, *supra* note 229, at 259; Ardagh, *supra* note 229, at 601.

Attorney mediators may have difficulty altering their aggressive, adversarial problem-solving attitudes to the non-adversarial passive approaches of mediation. *See* Riskin, *supra* note 78, at 43-48; M. WHEELER, *supra* note 38, at 210.

301. Genden, *supra* note 249, at 592 ("[T]he intervention of a stranger with a briefcase into what both parents and child recognize as an intensely personal conflict may be tantamount to forcing an attorney upon an unwilling young client.").

302. Ardagh, *supra* note 229, at 601 ("[T]he judge might rely too much upon lawyer-advocates for the child and thereby shirk their responsibility of making an objective judgment on the custody issue.").

303. *See* Speca, *supra* note 229, at 338.

304. Casasanto, *supra* note 40, at 55; Mlyniec, *supra* note 231, at 13; Chambers, *supra* note 253, at 513.

the custodial arrangements work."[305] One windfall for the disrupted joint custody family from the guardian's attempts to discern the most mutually satisfying arrangements is facilitation of communication between all concerned individuals. Fact finding by the guardian ad litem is the medium through which parents learn of their opponents' attitudes and concerns and, more importantly, of *their childrens'* attitudes and concerns, perhaps overlooked in the heat of personal conflict.[306] Rather than resenting the guardian's presence, parents tend to see the guardian ad litem as a neutral person whom they can trust[307] and who honestly cares for their children.[308] The guardian's impartial intervention on the children's behalf may moderate the atmosphere of conflict,[309] allow for exploration of alternative solutions[310] and promote parental satisfaction with the settlement or judicial decision, thus making future modifications less likely.[311] His or her appointment, in fact, may be implicitly for the purpose of reducing rancor in the proceedings.[312] With an impartial report and/or recommendation or argument made by the guardians ad litem before a court, parental mud-slinging to prove superior custodial "fitness" may become self-defeating. Tensions from such bitter combat may be reduced,[313] for parents may be compelled "to present a more realistic and less hostile position."[314]

Parents have good reason to cooperate with guardians ad litem, to seek to moderate their behavior toward one another and to improve their relationships with their children during the tenures of guardians

305. Casasanto, *supra* note 40, at 55 (quoting Watson, *The Children of Armageddon: Problems of Custody Following Divorce*, 21 SYRACUSE L. REV. 55, 78 (1969-1970). *See also* Note, *supra* note 14, at 1176 (instructions to be given to parents emphasizing their importance).

306. The power of the guardian ad litem to promote communication has been noted in Casasanto, *supra* note 40, at 46 ("[A]ppoint a guardian ad litem to present the child's interests to the court *and to the parents*." (emphasis added)); Note, *supra* note 14, at 1173 n.226 ("None of the attorneys reported that he had been forbidden to talk to a parent outside the presence of the parent's attorney."), at 1174 ("[D]iminish conflict by facilitating reliable communication between the parties."), at 1185 ("[E]nhanced communication between judge and child when an interview in chambers was requested.").

307. *See* Speca & Wehrman, *supra* note 10, at 39.

308. Speca, *supra* note 229, at 337.

309. Note, *supra* note 14, at 1174 n.236.

310. Levin, *supra* note 40, at 350 ("[T]he guardian could investigate and perhaps find certain situations in which obvious relief could be afforded to mutually unaware parents." (footnotes omitted)). *Cf. supra* notes 106-08 and accompanying text.

311. Casasanto, *supra* note 40, at 40.

312. Note, *supra* note 14, at 1136 ("Without a separate representative for the child, the judge is not well-placed to reduce the rancor of the proceedings.").

313. *See* Speca, *supra* note 229, at 337.

314. Genden, *supra* note 249, at 592 (citing CALIFORNIA GOVERNOR'S COMM'N ON THE FAMILY REPORT 48 (1966)). *See also* Note, *supra* note 14, at 1136 n.47, 1185.

ad litem. A report, argument, or recommendation by a guardian ad litem to a court which casts one parent in a bad light may be devastating for his or her future custodial status.[315] Not only his or her words, but the guardian's very presence emphasizes "to the parents that the controlling consideration is the welfare of the child, not *their* wishes and desires."[316] In the litigation stage of parental controversy, the influence of such personality may persuade parents *and their attorneys* to "drop a tactic ... or even an entire claim ... contrary to the child's needs" and to cooperate.[317] Such influences[318] may also be directed towards encouraging meaningful participation in mediation to produce a settlement.[319] When such mediation becomes prophylactic by its removal to the prelitigation dispute, participation and compliance by parents will certainly be increased.

Guardians ad litem may be the best mediators currently available for joint custody disputes. The factfinding skills acquired executing their duties in the courts are well suited for their educative roles as mediators. The children's best interests in mediation will not be compromised and cooperation and communication between parents will be encouraged by the guardians. If, however, parents will not or cannot cooperate, the children need not suffer while parental hostility builds until, finally, one parent or his or her attorney takes action. The guardian ad litem may step in to direct the children's needs to the court's attention. Joint custody may or may not survive court intervention in the arrangement, but at least with the guardian's involvement the decision will not be a matter of tossing a coin. The dispute will become less accusatorial and more inquisitorial and the best interests of the children just may be served.

As mediators, guardians ad litem are perhaps the best option available for the courts who are unhappily confronted by joint custody's increasing

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315. Speca, *supra* note 229, at 337; L. KIEFER, *supra* note 72, at 174 ("[I]f the attorney for your child recommends against you, you are completely ruined. Your chances of winning when an attorney for the children says you should lose are remote."). *But cf.* Note, *supra* note 14, at 1184. ("In practice, attorneys for the child perceived that they could wield a *powerful influence* in court, but admitted that they *did not control the custody determination.*" (emphasis added)).

316. Ardagh, *supra* note 229, at 574; Note, *supra* note 14, at 1174.

317. Note, *supra* note 14, at 1174, 1176 ("[P]arents' attorneys backed down from their positions and cooperated.").

318. Coercion is always a danger in evaluative mediation where "evaluation as a last resort" may pressure parties into unsatisfactory agreements. *See* Hopkins, *supra* note 106, at 68. The evaluative mediator, however, does not have the same degree of duty to children as the guardian ad litem who should never compromise the future happiness of the children for an immediate superficial solution.

319. Note, *supra* note 14, at 1173-75; Casasanto, *supra* note 40, at 40.

popularity. Mandatory mediation prior to further litigation of joint custody disputes by the guardian ad litem should keep many parents and their attorneys on the path of cooperation and communication for the benefit of the children. Where the court suspects the viability of joint custody and yet feels coerced by state policy or parental agreement into awarding joint custody, periodic monitoring of the arrangements by the guardian ad litem as mediator may be advisable. Guardians ad litem in a monitoring function can also provide courts and legislatures with invaluable information regarding the effect of joint custody on post divorce families. No longer need a "Catch-22" inhibit courts from awarding joint custody.

D. *Potential Problems with the Concept*

No doubt the concept of the guardian ad litem as a mediator and monitor will be challenged by many. The most certain objection will originate with those who advocate minimal state intervention in the family.[320] These persons argue that state intervention mandating appointment of a guardian ad litem should occur only when the need for separate representation is clearly shown.[321] During custody litigation, imposition of a guardian may be justified because parents have waived "their claim to parental autonomy and thereby their right to be exclusive representatives of their child's interests."[322] However, following the custody disposition, continuation of service by the guardian in such capacity "without parental consent is to deny both parents and child due process. It deprives parents of their right to represent their child through their own counsel"[323] or mediator. However, in most states the court under its *parens patriae* authority retains jurisdiction over the children of divorce until their attainment of majority.[324] The court has "virtually unlimited power in its role as the protector of children."[325] The appointment of guardians ad litem-mediators to protect children's best

320. Minimal state intervention in the custody decision-making process is exemplified by custody mediation at the time of divorce. *See, e.g.*, Spencer & Zammit, *supra* note 24, at 912.

321. *See* Ardagh, *supra* note 229, at 587, 588, 606.

322. J. GOLDSTEIN, A. FREUD & A. SOLNIT, *supra* note 227, at 115.

323. *Id.* at 113-14.

324. *See* Speca & Wehrman, *supra* note 10, at 9, 16; Long, *supra* note 226, at 620 n.43.

325. Speca & Wehrman, *supra* note 10, at 18.

Addressing the issue of the conceptual conflict between family autonomy and ongoing court involvement in the family after a custody decree, the Honorable Henry T. Webber, Judge of the Domestic Relations and Juvenile Divisions of the Court of Common Pleas, Lorain County, Ohio, for sixteen years, has remarked: "Everything is a balancing and the question is where your values take you. Wht is important: a viable relationship between parents and children or that children be left in a combat zone?" Conversation

interests in joint custody after a decree "would simply be another manifestation" of a court's equity-like powers.[326] One state explicitly permits continued service by guardians ad litem "after the final decree has been granted."[327]

Guardians ad litem-mediators may represent a happy medium between strict state supervision of joint custody arrangements and parental autonomy. As long as meaningful cooperation and communication exist on child-rearing issues between joint custodians, and children are not harmed by the arrangement, the mediator, who is coincidentally the children's guardian ad litem, must always defer to parental prerogative. However, when intense parental conflict destroys the vigor of joint custody, the children are endangered, and mediation cannot restore this vigor, the guardian ad litem, who happens to be the family's mediator, may exercise his or her authority as legal representative of the children to notify the court. Conferring such *restraints* and such *authority* upon the guardian ad litem does not seem radical. "Whenever courts become truly concerned with the possibility of inadequate protection for the rights of children, they can justify separate representation by invoking their inherent powers to do justice. The concept of the guardian ad litem is firmly established in the judicial system and can readily be expanded."[328]

From the perspective of legal ethics, guardians ad litem-mediators have both advantages and disadvantages over other mediators.[329] The question of multiple representation which afflicts attorney mediators does not exist when the guardian ad litem is a court employee[330] and/or legal representative for the children. However, the child advocate-

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with the Honorable Henry T. Webber, Judge of the Domestic Relations and Juvenile Divisions of the Court of Common Pleas, Lorain County, Ohio (Dec. 30, 1987).

326. *Id.* at 27, 29. *See also* J. GOLDSTEIN, A. FREUD & A. SOLNIT, *supra* note 227, at 124-25 (criticizing G. v. G., Conn. Super. Ct. No. 11 28 46 (Apr. 6, 1977) (unreported opinion), a case which retained counsel for the child after the final decree.).

327. N.H. REV. STAT. ANN. § 458:17(a) (Supp. 1985), *cited in* Casasanto, *supra* note 40, at 54.

328. Genden, *supra* note 249, at 586.

329. For a detailed analysis of ethical problems of lawyer mediators, *see generally* Silberman, *Professional Responsibility Problems of Divorce Mediation*, 16 FAM. L.Q. 107 (1982); Crouch, *supra* note 249.

Note that attorneys' malpractice insurance may not cover the practice of mediation. Coombs, *supra* note 69, at 492. As a court-appointed guardian ad litem, it may.

330. *See* Silberman, *supra* note 329, at 108 ("Mediation which is conducted or referred under the auspices of the court or its auxiliary services does not seem subject to ethics challenges." (footnotes omitted)); Crouch, *supra* note 250, at 223 ("[W]e should make a careful distinction between court-run mediation or conciliation programs and private profit-making ones. Obviously many of the objections to unconscionable profiteering and financial exploitation of clients...would not apply to the public-sector scheme."). Professor Charles Kettlewell, Ohio State University College of Law, concurs that court affiliation protects many from charges of ethical violations. Conversations with Professor Charles Kettlewell, Ohio State University College of Law (Feb. 1985).

mediator, if called to fulfill his or her responsibilities in court, may wrestle with the same dilemmas faced by other counsel for children with respect to representing the children's best interests as he or she unilaterally perceives them.[331] This might occur where an emotionally distraught child would rather endure his or her parents' bitter warfare in a joint custody arrangement than risk losing one or the other parent into the shadows of visitation.[332] Another problem arises for the child advocate by the likelihood that he or she will be called as a witness in a subsequent proceeding.[333] It seems unlikely that parents would knowingly waive their rights to call a mediator who would play such an influential role in litigation. Ethical problems which other guardians ad litem face should also be considered, such as maintaining the confidentiality of children's communications when not in their best interest and receiving payment from parents to represent their children without allowing parental influence upon their professional judgements.[334]

Opponents of the guardian ad litem-mediator structure for joint custody dispute resolution could also point out defects in the current practice of appointments of guardians ad litem which may carry over to this new function. Throughout the literature are examples of how indifferent, incompetent, or ineffectual representatives of the children

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331. Genden, *supra* note 249, at 589. *See also* Long, *supra* note 226, at 612-16, 623; Mlyniec, *supra* note 231, at 10; Note, *supra* note 14, at 1169.

332. Some suggested solutions to problems such as these include, "requesting the court's permission to withdraw, requesting appointment as guardian ad litem rather than as attorney, or making some sort of full or partial disclosure to the court that would include a statement of the child's wishes." Note, *supra* note 14, at 1170 (proposed by interviewed attorneys).

333. *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-101, DR 5-102 (1982). This situation is analogous to that where an attorney has been functioning both as a factfinder and as a child advocate prior to litigation and then upon litigation of the custody case needs to testify. Professor Charles Kettlewell analyzes the problem as having four separate solutions. (1) The court may deem the witness as the factfinder guardian ad litem and not as representing the child as an attorney at that instance. (2) The attorney may wait for a court order to testify or ask the court to sever the roles by appointing a new child advocate. (3) The child may be permitted to consent as such testimony would be in his or her best interests. And (4) the policies underlying DRs 5-101 & 5-102 may be weighed to permit the child advocate to testify as the guardian ad litem. The problems of cross-examination of a fellow member of the bar are not relevant in the absence of a jury (as in most states). However, there may be a danger of prejudicing the interests of the client if the "guardian" is impeached. Conversation with Professor Charles Kettlewell, Ohio State University College of Law (Mar. 14, 1985).

334. One possible solution to the conflict of interest created by parental compensation of the children's representative, *see* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-107(B), is for the "court appointed counsel [to] submit his expenses to the court" and the court could then bill the parent(s). "This would insulate the child advocate from the parents and address the ethical objection." Genden, *supra* note 249, at 591.

335. *See* L. KIEFER, *supra* note 72, at 174 (attorneys who share the judges' prejudices, inexperienced attorneys who need the business, sons and daughters of judges' social friends); Speca, *supra* note 229, at 338; Comment, *supra* note 226, at 255; Genden, *supra* note 249, at 590.

might be appointed.[335] For example, a "guardian ad litem system could risk exposure to politics and influence."[336] As long as mediators remain unlicensed and unregulated, however, guardians ad litem who are licensed as attorneys and regulated by the courts may be the only available resource promising reasonably proficient services.[337]

Another criticism which might be directed at the formula may relate to the guardians' lack of knowledge, sensitivity, and training to effectively mediate between the parents and protect the rights and interests of the children.[338] Skills acquired in negotiation, counseling, and mediation on the courthouse steps may not be sufficiently developed for child custody mediation. Proponents of implementation of the guardian ad litem mechanism in custody litigation have also expressed a concern for guardians' lack of expertise in the multitude of disciplines from which the ideal mediator might draw guidance to heal disruption in families.[339] Some writers have urged that a "new breed of lawyer" must emerge with specialized skills in these diverse areas to assume the role of guardian ad litem.[340] However, guardians ad litem, like the mediator, need not

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One writer suggests that in some jurisdictions for the guardians ad litem to do more than play "out an expected role with little variance in the script from one case to another...would virtually assure no future appointment and consequent loss of fees." Speca, *supra* note 229, at 338 n.54 (quoting Cohen, *The Function of the Attorney and the Commitment of the Mentally Ill*, 44 TEX. L. REV. 424, 448 (1966)).

The Honorable Henry T. Webber, Judge of the Domestic Relations and Juvenile Divisions, Court of Common Pleas, Lorain County, Ohio, for over sixteen years, demands much more from the guardians ad litem he appoints: "Generally, veteran practitioners are chosen to act as guardians ad litem. It is not the place to start experimenting with inexperienced attorneys." Judge Webber, however, has noted that not all courts may be as fortunate as his has been in recruiting "better than average attorneys interested in serving in these troubled situations." Seminar on "Guardian Ad Litem," Lorain County, Ohio (Dec. 8, 1987) and conversation with Judge Webber (Dec. 30, 1987).

In my own experience observing guardians ad litem, I have noted some who will make recommendations to the court after little more than brief conversations with the parties involved on the day of the hearing and others who will go a distance out of their way, including traveling to other cities, to complete thorough fact-finding.

336. Speca, *supra* note 229, at 338-39.

337. Mediators approved by the American Arbitration Association may be best suited to undertake the guardian ad litem role.

338. *See* D. SAPOSNEK, *supra* note 32, at 38 ("lawyers who typically are assigned the task of legal advocacy for the child usually have no special training for this task, and therefore are not necessarily more knowledgeable about, or sensitive to, the needs and feelings of children than are the judges or the parents' own attorneys."). *But cf. supra* notes 290-301 and accompanying text.

339. *See* Genden, *supra* note 249, at 589; Speca, *supra* note 229, at 333, 337; Levin, *supra* note 40, at 363.

340. *See, e.g.*, Levin, *supra* note 40, at 363 ("trained in psychoanalytical child development and specializing in child-custody cases").

Likewise, some commentators on mediation appear to demand skills and knowledge by the mediator which would effectively preclude its practice except by an elite few. *See, e.g.*, D. SAPOSNEK, *supra* note 32, at 37.

> The mediator must be competent to give valid, current, and helpful information about child development, about children's typical and atypical responses to family

be an expert in these disciplines.[341] For the guardian ad litem "to at least be aware of the issues and understand the terminology of such disciplines so that he or she can present innovative solutions" may be sufficient.[342] The mediation skills acquired by *experienced* guardians ad litem in the midst of custody controversies give guardians ad litem definite advantages over others for whom assuming the "go-between" role may be a novel concept. Of course, additional training would always be desirable.

As previously suggested, the costs for representation of children in custody proceedings,[343] creates discomfort for some critics and the

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conflicts, about family members' needs and feelings, about family dynamics, about the divorce process (emotionally, structurally, and legally), and about the likely future outcomes for the children and parents of a variety of different postdivorce family structures. The mediator should be knowledgeable about individual psychodynamics, interactional dynamics, family systems, and behavior change, and have a broad general knowledge of psychological functioning. Child custody mediators who are not specifically trained in these areas may seriously compromise the benefits of child custody mediation.

Id. (footnote omitted).

This laundry list of requirements for the mediator seems to require employment of mental health professionals in such capacity. However, mental health professionals who mediate family disputes may lack sufficient knowledge of the "legal ramifications of decisions made" by the parents to guide them properly to legally valid agreements. Coombs, *supra* note 69, at 493. They may inadvertently "engage in the unauthorized practice of law, exposing themselves to criminal sanctions." *See* Silberman, *supra* note 329, at 123. There is also a "danger that mediation might be swallowed up by other therapy functions, when it should be visible to the public as a distinct alternative to the courtroom." M. WHEELER, *supra* note 38, at 209. Finally, mediation by mental health professionals may be distasteful to some parents who are "self-conscious" about submission of their problems to therapy. *Id.*

341. "It is expected that the guardian will seek out and use expert opinions when appropriate to facilitate" the purposes of mediation and child protection. Casasanto, *supra* note 40, at 55. As with other mediators, the guardian ad litem should avoid transforming mediation into therapy. The guardian ad litem may be empowered, however, to employ mental health professionals to counsel the family prior to taking unsuccessful mediation into court, a power the private mediator may not have. *See* J. GOLDSTEIN, A. FREUD & A. SOLNIT, *supra* note 227, at 56 (counsel for child employing mental health professionals).

See also supra note 192 and authorities cited therein; STANDARDS FOR FAMILY MEDIATORS, *supra* note 112, at 455 ("the mediator shall distinguish [mediation] from therapy or marriage counseling"), at 457 ("a mediator who is a mental health person, shall not provide counseling or therapy to either party or both during or after the mediation process"), at 458 (the mediator may be required "to recommend either or both [parents] obtain expert consultation in the event that it appears that additional knowledge or understanding is necessary for balanced negotiations"). *See also* Axelrod, Everett & Haralambie, *supra* note 50, at 45 (mediation is not therapy). *But cf.* Note, *supra* note 51, at 593 ("A mediator trained in the behavioral sciences can provide psychological counseling to the parties as well as mediating a resolution").

342. Casasanto, *supra* note 40, at 55.

343. *See supra* notes 297-99 and accompanying text. *See also* Davidson & Gerlach, *supra* note 37, at 251.

344. Joint custody is deemed by many commentators as a device suitable only for the affluent, with its demands for two households for the children for joint physical

guardian ad litem-mediator mechanism proposed may increase costs dramatically. In custody litigation, parents who are already saddled with expenses for their own attorneys, court costs, and possibly for psychiatric examinations or social or investigative agency services may begrudge outlays for another attorney for their children. In post-divorce situations, especially cases of joint custody, one parent may be supporting two households or one income may be supporting a household which formerly had, and requires, two incomes.[344] If long-term, post-divorce employment of guardians ad litem as mediators is mandated, many parents' incomes may be overwhelmed. Mediation, itself, in the post-divorce context, without limitations on its duration or direction, may be expensive.[345] When attorneys are introduced as guardians ad litem-mediators, for whom level of compensation may affect quality and availability,[346] parents may see costs skyrocket.[347] Currently, the court may order one or both parents to finance representation.[348] If indigent parents are involved, a governmental agency may cover these costs.[349] Other alternatives to

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custody or constant travel for joint legal custody. *See, e.g.*, Skoloff, *supra* note 29, at 54; M. WHEELER, *supra* note 38, at 81; *Why Joint Custody Doesn't Always Work*, *supra* note 28, at 60 ("It's an upper-middle class phenomenon," *quoting* C. Ray Fowler, executive director of Family Mediators). *But cf.* I. RICCI, *supra* note 43, at 112; Miller, *supra* note 2, at 563. For a general discussion of the financial effects of joint custody on families, *see* Patterson, *supra* note 43.

Disparities in earning power between the parents and the inevitable occasions of extraordinary expenses can create anger and resentment threatening joint custody. *See* Gardner, *supra* note 1, at 69. For a discussion and examples of how parents can cope with these circumstances, *see* Parley, *supra* note 6, at 518; *A Report of A Study*, *supra* note 7, at 408; M. WHEELER, *supra* note 38, at 801.

The mechanism proposed herein should also correct the inequalities of financial burdens which may result from awards of joint custody, because the guardian ad litem may petition the court for increase or decrease in the support award according to the equities of the physical custody arrangement. Note that the recent reform of child support laws in the United States has in some instances, at least temporarily, overlooked joint custody arrangements. *See* OHIO CHILD SUPPORT GUIDELINES Part IVCA (Prepared by Supreme Court Advisory Committee on Child Support Enforcement, Seventh Draft, Mar. 1986). This omission is ironic because one of the most frequent criticisms of joint custody is that it is sought by many men merely to reduce or eliminate child support obligations. *See, e.g.*, Schulman, *supra* note 6, at 3; *Second Thoughts on Joint Child Custody*, *supra* note 40, at 4.

345. The reader should note that *any* post-divorce mediation program may be impossible for some families because of prohibitive costs. Parents may pay not only for the mediator's services, but for retention of their own attorneys during the process to approve agreements.

346. Genden, *supra* note 249, at 591.

347. *See* Dullea, *supra* note 71, at 15 ("In general, the charge for mediation is said to range from $50 to $100 an hour...lawyers' fees range from $125 to $300 an hour.").

348. *See* Davidson & Gerlach, *supra* note 37, at 251 ("Fourteen states have laws which provide for the court to enter an order against one or both parents, requiring them to pay the costs, fees, and disbursements of the guardian ad litem or counsel for the child." (footnotes omitted)); Levin, *supra* note 40, at 364 (citing UNIFORM MARRIAGE AND DIVORCE ACT).

349. *See* Davidson & Gerlach, *supra* note 37, at 251; Levin, *supra* note 40, at 364; Genden, *supra* note 249, at 591; Casasanto, *supra* note 40, at 40, 56-57.

reduce costs for indigent families or for financially strapped families include enlistment of *pro bono* services to provide guardian ad litem-mediators[350] or full or partial governmental subsidization of a program. Benefits inuring to the children of divorce from the institution of such a system may easily justify public funding to secure skilled personnel.

The most severe criticism of the guardian ad litem-mediator mechanism may originate with advocates of joint custody.[351] Parental autonomy and family privacy will be decimated by the intrusion of such a powerful figure into the joint custody arrangement. Parents may feel restricted in their actions and fear that unconventional behavior or lifestyles will clash with individual values of the guardian ad litem. A conservative, unsympathetic, or narrow-minded guardian ad litem may discriminate against them or even deem trivialities as sufficient grounds for recommending to a similarly disposed court that they lose custody. One of the original purposes behind joint custody was to circumscribe, if not eliminate, the "third parent," the court, from the post-divorce family. The guardian ad litem may pose a greater threat than the court. He or she may exceed his or her authority and attempt to become the sole post-divorce decision-making parent. Parents may fear attacking a "friend of the court" to regain authority or to effectuate the guardian's removal. Among less domineering guardians ad litem, skepticism regarding the underlying values or application of joint custody may cause

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The presence of this service for indigent parents may allow wider application of the joint custody system, regarded by some as only available to the affluent. *See supra* notes 43, 344 and authorities cited therein.

Whether joint custody is even possible among low income individuals is analyzed at Johnson, *Joint Custody Arrangements and AFDC Eligibility*, 18 CLEARINGHOUSE REV. 3 (May 1984).

350. *See* Levin, *supra* note 40, at 364 (pro bono services proposed).

For parents who cannot afford the services of a guardian ad litem-mediator after divorce, the establishment of programs may be the only manner by which parents and courts may reap the benefits of the mechanism proposed in this Article. Funding of such programs, however, is perhaps the most critical problem for the practical viability of the mechanism, even if such programs are established. Judge Henry T. Webber of the Domestic Relations and Juvenile Divisions of the Court of Common Pleas of Lorain County, Ohio, has commented on the interrelationship between funding and the quality of mediation and conciliation programs for custody and visitation disputes. He has observed that often funding for innovative programs is "most erratic." Without consistent and adequate funding, such programs will attract only "people who can do nothing else" rather than "people who do it out of dedication." Dedication, however, is not enough, because the "suitable" practitioners must have a "native ability" to mediate such family conflicts, for "this is not amateur night." Even if "careful in selection of a mediator" among this group of qualified and dedicated individuals, Judge Webber has noted a "very high burn-out rate" among them. He has therefore expressed grave doubts as to the efficacy of a system which would rely on pro bono referrals, legal aid attorneys, or government subsidization. Conversation with the Honorable Henry T. Webber, Judge of the Domestic Relations and Juvenile Divisions of the Court of Common Pleas, Lorain County, Ohio (Dec. 30, 1987).

351. *But cf.* Foster & Freed, *supra* note 17, at 27 ("The injection of the child counsel or watchdog into the picture [at the time of divorce] probably would result in more court decrees awarding joint custody.").

guardians ad litem-mediators to attempt to abolish the system. Guardians' doubts as to parents' ability to put aside their differences and cooperate after divorce and guardians' doubts as to the benefits of shuttling children between homes to effect parental interaction, may cause some guardians to overreact to disturbances in parental relationships or in children's behavior which may simply reflect natural adjustment to the divorce.[352]

Moreover, a guardian ad litem-mediator may see a joint custody dispute as a vehicle to perpetuate his or her own employment. Without a pending legal action to circumscribe the duration of the process as in divorce mediation, post-divorce mediation may continue indefinitely. For the guardian, parental cooperation and communication on child-rearing issues without assistance may signal termination of employment. Unlike private mediators who may rush agreement between parents to chalk up another success, the guardian ad litem may unnecessarily prolong the process to avoid final agreement. Protracted mediation promises larger fees and perhaps a reawakening of hostilities between parents. Parents may come to distrust mediation and seek court intervention. Deliberate procrastination in dispute resolution by the guardian may undermine not only parental trust but parental expectations that joint custody is a viable system for their post-divorce family. Too much depends upon the individual personality of the guardian.

Specific guidelines to delineate rights, powers, and scope of authority of guardians ad litem, parents, and children within the proposed system of joint custody mediation should eliminate most of the potential problems. Such guidelines may be incorporated into the joint custody final decree or may be used by courts to set a general framework for reference. Of course, each family will require a set of rules framed according to its particular needs and circumstances. The following sample guidelines might be used by courts and families in the development of their individualized programs for joint custody mediation.

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352. The guardian ad litem's presence rather than increasing cooperation and communication within the family, *see supra* notes 304-14 and accompanying text, may potentially create a chasm between the parents and the children as the guardian ad litem may become the instrument through which children can execute manipulation and other strategies on their parents. Ardagh, *supra* note 229, at 582-83.

GUIDELINES

A. Duration of service of the Guardian ad litem-mediator.[353]

(1) Termination after one year's mediation service upon agreement by both parents and their attorneys, if any, *and* the guardian ad litem, subject to immediate reinstatement by written request of either parent for any good faith reason at any time until [termination date or contingency]

(2) Termination after two year's mediation service by agreement between both parents, and their attorneys, if any, subject to immediate reinstatement by request of either parent, if either parent reasonably believes the health or safety of the child(ren) is threatened;

(3) Termination after child(ren) reach(es) age of sufficient maturity to mediate between parents, by agreement of both parents, their attorneys, if any, and the guardian ad litem, subject to immediate reinstatement by request of the child(ren) for any reason which the guardian ad litem reasonably believes affects the child(ren)'s best interests; or

(4) Termination and replacement by court order at any time upon request by *either* parent or any child for good cause shown by

353. The duration of the service of guardian ad litem-mediator would vary according to need perceived for such service by the parties or by the court. An anticipated termination date, definite or based upon some contingency, however, should be set at the initiation of the program to avoid later misunderstandings between the guardian ad litem, the court, and the parties. There is certainly the potential for malpractice to be alleged against the guardian ad litem who believes his or her tenure has expired, contrary to the expectations of the court or the parties, especially in a crisis situation.

The basis for the figures employed herein is the estimate given by some commentators as to the period of time required for parents to surface from the disorganization and disequalibrium of divorce and to fully adjust to their new roles and responsibilities. *See* Scheiner, Musetto & Cordier, *supra* note 19, at 1000 (one year); J. FOLBERG & A. TAYLOR, *supra* note 72, at 161 (two years). *But cf.* J. WALLERSTEIN & J. KELLY, *supra* note 21, at 190 (five years after the divorce the study of sole custody families revealed that "31% of the men and 41% of the women had not yet achieved psychological or social stability").

[standard of proof] evidence of guardian ad litem-mediator:

(a) incompetence or bias,

(b) excessive influence,

(c) extreme interference with the joint custody family not reasonably related to protection of any child's best interests,

(d) or any other reasonable ground, (e.g. gross incompatability with children).

Reasonable notice shall be provided to the guardian ad litem-mediator and all interested individuals, unless exceptional circumstances demand an *ex parte* hearing for this limited purpose. [This proceeding should be summary in character and preferably *in camera.*]

(5) Notwithstanding any other provision of these guidelines, termination by voluntary withdrawal of the mediator at any time after one year, by entry filed with the court if the mediator reasonably believes the joint custodians have established and will perpetuate a relationship of cooperation and communication for the benefit of the children, subject to immediate reinstatement by written request of either parent which shall be filed with the court, if the guardian ad litem reasonably believes the health or safety of the child(ren) is threatened.

B. Authority of the Guardian ad litem-mediator[354]

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354. The mediating and monitoring role of the guardian ad litem in the post-divorce family does not confer added authority upon the guardian ad litem. Rather, when exercising his or her mediator function, the guardian ad litem should feel much more constrained in authority than when officially acting as a friend of the court or attorney for the children in the courtroom setting. Just as the function of the guardian ad litem in judicial proceedings strictly corresponds to the scope, direction, and duration of the judicial inquiry, the function of the guardian ad litem in mediation practice should be generally circumscribed to implementing measures to effect familial self-determination of the best interests of the children. Never should the guardian ad litem permit any one, including him or herself, to perceive his or her authority as that of a guardian of the person or estate of the children of a joint custody family.

(1) Unless the guardian ad litem-mediator reasonably believes that the best interest of the child(ren) require otherwise *and* duly exercises his or her authority under subsection (2) of this section, the guardian ad litem shall at all times:

(a) function exclusively as a mediator for all disputes which the parents present for mediation for the duration of his or her service;

(b) promote the policy of this joint custody decree [that the children's best interests are optimally served by maximum contact with both parents and that both parents shall equally share decision-making responsibility for all major decisions which may affect the children];

(c) respect and protect the privacy of the family during and after his or her service for the family;

(d) strictly adhere to the Standards of Practice for Lawyer Mediators in Family Disputes (1984) of the American Bar Association;

(e) upon reasonable written notice, be available to the child(ren) and the family for mediation related services, except written notice shall not be required when the child(ren)'s health or safety is in imminent peril; and

(f) presume that each parent is fit for custody of the child(ren) as determined by the court.

(2) When in the course of providing mediation related services for the joint custody family the guardian ad litem-mediator reasonably believes that the best interests of the children are severely threatened by

(i) parental neglect,

(ii) excessive inter-parental hostility,

(iii) parental abuse, or

(iv) the mechanics of the joint custody arrangement in general (shuttling, etc.)

the guardian ad litem immediately shall

(a) attempt to mediate an agreement between the parents to eliminate the severe threat;

(b) if subsection (a) is not effective, temporarily terminate mediation and refer parents to outside experts in helping professions;

(c) if subsection (a) or (b) is not effective, *or* if the threat to the children's best interests manifestly demands imperative action, [according to his or her authority as a guardian ad litem,]

(1) notify the court of the threat, or

(2) institute an action on behalf of the child(ren) to remove the threat; and

(3) if either (1) or (2) is invoked, show by [standard of proof] evidence that such action is imperative;

(d) attempt to resume mediation between the parents in the course of litigation and to obtain a settlement in the best interests of the chil(ren).

C. Responsibilities of the Joint Custodians

(1) Joint custodians shall, at all times in the course of mediation, exert their best effort to comply with the policy clause of this decree;

(2) Joint custodians shall in good faith participate in mediation and comply with the agreements signed in mediation, unless either joint custodian reasonably believes that circumstances have *radically* changed and the best interests of the child(ren) are not served by the agreement, at which time said parent shall immediately enter mediation to effect a change in the agreement to serve the best interests of the child(ren).

(3) Joint custodians shall notify the guardian ad litem-mediator of all major disputes which may affect the children at least thirty days prior to initiation of any action in court, except as provided in section A(4) of these Guidelines, and submit any such dispute to mediation;

(4) Joint custodians shall furnish to the guardian ad litem-mediator upon reasonable notice

(a) private access to the child(ren) prior to or during mediation sessions at the child(ren)'s current residence or at the site of the mediation, unless *both* parents believe such access is unreasonable, and *agree* to a reasonable location and/or means of access [such as with a neutral relative];

(b) access to any and all records pertaining to the child(ren); and

(c) access to any other nonprivileged information not pertaining to the children which may reasonably facilitate the mediation process.

D. Schedule of Mediation and Monitoring Sessions[355]

(1) For the first year following the date of this decree, mediation sessions shall be at four month intervals and as provided in subsection (3) of this section.

(2) Except as provided in Section A(5) of these Guidelines, for the second year following the date of this decree, mediation sessions shall be held periodically at six month intervals and as provided in subsection (3) of this section.

(3) Except as provided in Section A(5) of these Guidelines, mediation sessions may be held at any time upon request of either parent or any child upon reasonable written notice of the request and an explanation of the need for mediation, except reasonable notice shall not be required when the child(ren)'s health or safety is in imminent danger.

(4) Notwithstanding the preceding subsections of this section, if either joint custodian returns to court to dispute the original or amended joint custody decree or the guardian ad litem justifiably takes action to enforce compliance with the original or amended joint custody decree, the guardian ad litem with leave of court *may* adjust the schedule to reinstate the process as in subsection (1), unless *both* parents agree otherwise.

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355. The schedule for mediation sessions proposed herein is obviously somewhat arbitrary and must be adjusted to the circumstances of the family and the award. For example, in those courts where the joint custody decree is provisional for a short period of time, *see supra* note 220, the court may order mediation by the guardian ad litem at monthly intervals until the decree is final and thereafter at specified six month intervals.

IV. CONCLUSION

Gradually, courts are awakening to the fact that children require a positive, continuous relationship with each parent following a divorce. However, the current practices of custody adjudication and disposition tend to subvert the development of this type of relationship rather than advance it. Awarding joint custody to a broken family may be one of the few alternatives available to expeditiously mitigate the disruption of divorce and insure continuous, quality parenting of children following divorce.

Courts, however, may justifiably question the wisdom of joint custody for many families. Yet, they may not have the time nor the inclination to challenge parental agreements for joint custody or state policies favoring the arrangement. The appointment of a guardian ad litem for the children in joint custody families to temporarily perform mediation for the family and monitoring services for the court as joint custody continues may be the best available solution. Courts need not relinquish their responsibility to supervise the interests of the children after divorce to the unknown mechanics of this still relatively new custody system. Parents will retain autonomy from governmental intrusion into family decision-making so long as they continue to cooperate and communicate on issues affecting their children. Children will derive benefits from contact with two parents, much as if the family had survived intact.

When courts encounter suspicious joint custody separation agreements or when they cannot ascertain the maturity of the parents to cooperate after divorce, but, in either instance feel compelled to order joint custody or reluctant to deny it, the guardian ad litem-mediator should be enlisted to serve the family and the court.[356] Such a mechanism may discomfort

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356. Some circumstances wherein the guardian ad litem-mediator mechanism may best be employed:

(1) generally where questionable agreements to joint custody are submitted to the court for approval;

(2) where one or both parents object to joint custody, but where statutory policies mandate its award;

(3) where parents have agreed to joint custody, but are exceptionally hostile and contentious with respect to other terms of the divorce;

(4) where neither parent is willing to shoulder the burden of full responsibility as a sole custodial parent. *See* Comment, *supra* note 20, at 1117, or neither parent is regarded as fit in such capacity, but the court is inclined toward an award of joint custody for lack of a better alternative. *See* Stamper v. Stamper, 3 FAM. L. REP. (BNA) 2541 (Mich. Cir. Ct., Wayne Co. 1977); M. WHEELER, *supra* note 38, at 86 (discussion of other cases);

(5) where courts are caught in a "Catch 22" as to the viability of the concept of joint custody. *See supra* note 45 and accompanying text.

some proponents of each of the three custody reforms — joint custody, custody mediation, and guardians ad litem — but they can hardly object to measures aimed at making each of them work.[357] They can hardly object to further measures to protect the best interests of the children.

357. *A Bill of Rights*, *supra* note 236, at 356.